SUPREME COURT OF THE UNITED STATES.

No. 1240.

HENRY ZEIGLER, PLAINTIFF IN ERROR,

vs.

THERON R. HOPKINS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

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Writ of Error.

*a * UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the judges of the Circuit Court of the United States of the ninth judicial circuit, district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you between Henry Zeigler, plaintiff and plaintiff in error, and Theron R. Hopkins, defendant and defendant in error, a manifest error hath happened to the great damage of the said plaintiff and plaintiff in error as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at City of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 24th day of November in the year of our Lord one thousand eight hundred and eighty-five and of the Independence of the United States the one hundred and tenth.

[SEAL.] L. S. B. SAWYER,
Clerk U. S. Circuit Court, 9th Circuit, Dist. of Cal.

The above writ of error is hereby allowed.

LORENZO SAWYER,
U. S. Circuit Judge, 9th Circuit.

Due service admitted of above writ of error.

WM. F. GIBSON,
Defendant's Attorney.

PHILIP G. GALPIN,
Of Counsel for Defendant.

The answer of the Judges of the Circuit Court of the United States for the District of California.

The record and all proceedings of the plaint whereof mention is within made with all things touching the same, we certify under the seal of our said Court to the Supreme Court of the United

States within mentioned at the day and place within contained in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[SEAL.] L. S. B. SAWYER,
Clerk.

[Endorsed:] United States Supreme Court: Henry Zeigler, plaintiff and plaintiff in error, *vs.* T. R. Hopkins, defendant and defendant in error. Writ of error. Filed, November 28th, 1885. L. S. B. Sawyer, clerk.

Citation.

*b * UNITED STATES OF AMERICA, *ss:*

To Theron R. Hopkins, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1886, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States of the Ninth Judicial Circuit, District of California, wherein Henry Zeigler is plaintiff and plaintiff in error, and you are defendant and defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, Judge of the Circuit Court of the United States, of the Ninth Circuit, this 24th day of November, A. D. 1885, and of the Independence of the United States, the one hundred and tenth.

LORENZO SAWYER,
U. S. Circuit Judge Ninth Circuit.

Due service of above citation admitted.

WM. F. GIBSON,
Defts. Atty.
PHILIP G. GALPIN,
Of Counsel for Deft.

[Endorsed:] Filed November 30, 1885.

In the Supreme Court of the United States.

HENRY ZEIGLER,
Pl'ff and Pl'ff in error,
v.
THERON R. HOPKINS,
Def't and Def't in error.

Citation.

L. S. B. SAWYER,
Clk U. S. C. C. Dist. of Cal.
By F. D. Moncton, *D'y Cl'k.*

Assignment of Errors.

*c * In the Supreme Court of the United States of America.

HENRY ZEIGLER,
Plaintiff in Error,
vs.
THERON R. HOPKINS,
Defendant in Error,

And now comes Henry Zeigler, the plaintiff in error, and says, that in the record and proceedings aforesaid, there is error in this, to wit:

I. That the findings of facts do not sustain the judgment herein.

II. That the decision of the Mayor, that the petition was signed by a majority as required by the Act of the Legislature of the State of California, entitled "An Act to open and establish a public street in the City and County of San Francisco, to be called Montgomery Avenue," and to take private land therefor, approved April 1st., 1872, is so far conclusive, that the same cannot be disputed in this action, and that the evidence to the contrary should have been disregarded and excluded.

III. That the judgment of the County Court, confirming the report of the Board of Public Works, after the notice required by section 6 of the said Act was given, was a final adjudication of the same, and no appeal having been taken therefrom, the question of the validity of said petition is *res adjudicata*.

Wherefore, the said Henry Zeigler, plaintiff in error, prays that the said judgment may be reversed.

DANIEL ROGERS,
Atty for Henry Zeigler, Plaintiff in Error.
E. F. PRESTON,
Of Counsel for Plaintiff in Error.

Joinder in Error.

*d * In the Supreme Court of the United States.

HENRY ZEIGLER,
Plaintiff in Error,
vs.
THERON R. HOPKINS,
Defendant in Error.

Now comes the defendant by Philip G. Galpin, and W. F. Gibson, his attorneys, and joining in the assignment of error heretofore filed and served herein by said plaintiff in error, alleges: that in the record and proceedings of said cause no error whatever appears, and further denies that the finding of facts herein do not support the judgment, and denies that said decision of said Mayor in said assignment of errors mentioned is so far conclusive that it cannot be disputed in this action, and denies that the evidence to the contrary of said decision should have been disregarded; and alleges that the alleged petition in said assignment mentioned, and the last assess-

ment roll for State, City and County taxes preceding the filing of said alleged petition, were admissible in evidence to contradict said decision by said Mayor, and denies that said judgment of said County Court in said assignment of errors mentioned, confirming the report of the Board of Public Works, etc., was a final adjudication of the same, and denies that the question of the validity of said petition thereby became *res adjudicata*; and defendant alleges that by said certificate and said report so confirmed as aforesaid, and by the said judgment of said County Court, he is not estopped from proving by said petition and the last annual assessment roll for City, County and State taxes preceding the filing of said alleged petition, that said petition was not signed by the owners of a majority in frontage of the property described in section four of said act of April 1, 1872, in said assignment of errors mentioned.

* l Defendant denies that the Court erred in admitting in evidence said petition and said assessment roll.

W. F. GIBSON,
Attorney for Defendant.

PHILIP G. GALPIN,
Of Counsel for Defendant.

Complaint.

* 1 * In the Circuit Court of the United States of the Ninth Circuit, in and for the State of California.

HENRY ZEIGLER,
Plaintiff,
vs.
THERON R. HOPKINS,
Defendant.

CITY AND COUNTY OF SAN FRANCISCO, *ss.*

Henry Zeigler complains of Theron R. Hopkins, and for a cause of action, alleges as follows, to wit:

I. That the said plaintiff is a citizen of the State of Ohio, and the said defendant is a citizen of the State of California.

II. That on the seventh day of March, A. D. 1884, this plaintiff was lawfully possessed as owner in fee simple of the following described premises, that certain lot or parcel of land situated in the City and County of San Francisco and State of California, and bounded as follows, commencing at a point on the southerly line of Francisco street distant one hundred and twenty-three (123) feet easterly from Van Ness Avenue; thence running easterly along said

* 2 * line of Francisco street thirty-seven feet six inches (37 6-12); thence at right angles southerly one hundred and thirty-seven feet six inches (137 6-12); thence at right angles westerly thirty-seven feet six inches (37 6-12); and thence at right angles northerly one hundred and thirty-seven feet six inches (137 6-12) to the point of beginning.

III. That being so possessed the defendant afterwards, on the eighth day of March, A. D. 1884, entered into the said premises and

that he unlawfully withholds from the plaintiff the possession thereof, to his damage of six hundred dollars.

Wherefore the plaintiff demands judgment against the defendant, that he surrender to him the possession of said premises, and pay to him the sum of six hundred dollars damages for the unlawful holding of the same.

DANIEL ROGERS,
Attorney for Plaintiff.

[Endorsed:] Filed March 15, 1884.

L. S. B. SAWYER, *Clerk.*

Summons.

* 3 * UNITED STATES OF AMERICA

Circuit Court of the United States, Ninth Circuit, District of California.

Action brought in the said Circuit Court and the complaint filed in the office of the clerk of said Circuit Court in the City and County of San Francisco.

HENRY ZEIGLER
Plaintiff,
vs.
THERON R. HOPKINS,
Defendant.

The President of the United States of America, greeting to Theron R. Hopkins:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the Circuit Court of the United States, Ninth Circuit, in and for the District of California, and to file your plea, answer or demurrer to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said Court in the City and County of San Francisco, within ten days after the service on you of this summons—if served in this county; or if served out of this county, then within thirty days—or judgment by default will be taken against you.

The said action is brought to recover from you the possession of certain land and premises more particularly described in said complaint
* 4 to * which reference is hereby made, and six hundred dollars damages for your alleged unlawful withholding of the same, and if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will apply to the Court for the relief demanded in the complaint herein.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 15th day of March in the year of our Lord one thousand eight hundred and eighty-four and of our Independence the 108th.

[SEAL.] L. B. S. SAWYER, *Clerk.*

[Endorsed:] UNITED STATES MARSHAL'S OFFICE,
District of California.

I hereby certify that I received the within writ on the 15th day of March, 1884, and personally served the same on the 15th day of March, 1884, by delivering to and leaving with Theron R. Hopkins, said defendant named therein, personally, at the City and County of San Francisco, in said District, a certified copy thereof, together with a certified copy of the complaint attached thereto.

M. M. DREW,
U. S. Marshal,

* 5 * San Francisco, March 17th, 1884.

By B. J. ACKERMAN, *Deputy.*

Filed March 17, 1884.

L. S. B. SAWYER, *Clerk.*
By F. D. MONCTON, *Deputy Clerk.*

* l

Answer.

* 6 * In the Circuit Court of the United States, Ninth Circuit, in and for the District of California.

HENRY ZEIGLER, PLAINTIFF,
v.
THERON R. HOPKINS, DEFENDANT.

Now comes the defendant, Theron R. Hopkins, and, answering the complaint herein, denies:

1st. That on the seventh (7th) day of March, A. D. 1884, or at any other time whatever, the plaintiff herein was possessed, as owner in fee simple, or in any other manner, of that certain lot or parcel of land described in the complaint, or any part thereof.

2d. Denies that the plaintiff was ever, or is now, entitled to the possession of the whole, or any portion thereof, and denies that plaintiff has now, or ever had, any estate therein at any time, or at all.

* 7 3d. Denies that the defendant unlawfully * withholds the possession of the said premises from the plaintiff. And denies that the said plaintiff has been damaged by said defendant's withholding the the said premises, or the possession thereof, in the sum of six hundred ($600) dollars, or any other sum, or at all.

Wherefore defendant prays your Honorable Court that the complaint in this action may be dismissed, and that said defendant may have judgment for the costs of said suit in this behalf sustained.

WM. F. GIBSON,
Attorney for Defendant.

[Endorsed:] March 24, 1884. Service of a copy of this answer is hereby admitted.

DANIEL ROGERS,
Att'y for Pl'ff.

Filed March 24, 1884.

L. S. B. SAWYER, *Clerk.*
By F. D. MONCTON, *Deputy Clerk.*

Stipulation Waiving Jury.

* 8 * In the U. S. Circuit Court, Ninth Circuit, District of California.

HENRY ZEIGLER
v.
THERON R. HOPKINS.

It is hereby stipulated by the attorneys of the respective parties, that a jury be, and the same is, hereby waived, and we further stipulate that said cause be tried by the Court without a jury.

DANIEL ROGERS,
Atty. for Plaintiff.
WM. F. GIBSON,
Atty. for Defts.

[Endorsed:] Filed Nov. 28, 1884.
L. S. B. SAWYER, *Clerk.*

Findings of Fact.

* 9 * In the Circuit Court of the United States in and for the District of California.

HENRY ZEIGLER
vs.
THERON R. HOPKINS. } In ejectment.

This cause having come on regularly for trial in its order on the calendar, Mr. Daniel Rogers appeared for the plaintiff and Mr. Gibson and Mr. Galpin for the defendant; and, by stipulation in writing, a jury was waived, and the trial proceeded before the Court, before whom testimony was introduced on the part of plaintiff and defendant, and the cause, being argued by counsel, was submitted; and being taken under advisement, the Court now finds the following facts and conclusions of law:

I. The plaintiff is, and was at the commencement of this action, a citizen of the State of Ohio; and the defendant is, and then was, a citizen of the State of California.

* 10 * II. The premises in dispute, exclusive of costs, then exceeded, and do exceed, the value of six thousand dollars.

III. The Defendant was in possession of the premises on the 7th day of March, 1884, and has so remained until the present time.

IV. Said premises are situated in the City and County of San Francisco, State of California, are within the District of assessment described in section four of an Act of Legislature of the State of California, approved April 1, 1872, entitled "An Act to open and establish a public street in the City and County of San Francisco, to be called Montgomery Avenue, and to take private lands therefor," and are bounded and described as follows: Commencing at a point on the Southerly side of Francisco street, distant one hundred and twenty-three feet, Easterly from Van Ness Avenue; thence running Easterly along said line of Francisco street thirty-seven feet and six inches; thence at right angles Southerly, one hundred and thirty-seven feet and six inches; thence at right angles Westerly, thirty-

seven feet and six inches, and thence at right angles Northerly, one
* 11 hundred and thirty-seven feet and six inches to the point * of beginning.

V. On the trial plaintiff claimed seisin of said premises solely under and by virtue of proceedings had and taken under the Act, last aforesaid, and under a certain tax deed of said premises, which he offered in evidence, executed by John H. Grady, as Tax Collector of said City and County to Samuel F. Sinclair, on a sale of said premises made by said Tax Collector on the 25th day of March, 1879, for non-payment of the Montgomery Avenue tax (in said Act mentioned) on said premises for the fiscal year ending June 30th, 1879. Plaintiff's title is regularly deraigned from said Sinclair.

VI. That a petition, regular in form, for the opening of said
* Avenue was presented to the then Mayor of said City and County on the day of April 1872; that said Mayor received the same, and the then Mayor, Tax Collector and Surveyor of said City and County, afterwards annexed thereto their several certificates that said petition had been subscribed by the owners of a majority in frontage of the property described in section four of said Act, as said owners were named in the last preceding annual assessment
* 12 roll for said State, * City and County taxes, and thereupon said Mayor, Tax Collector and Surveyor, proceeded to perform various duties imposed upon the Board of Public Works, by said Act.

VII. The total frontage of the property described in section four of said Act, is four hundred and twenty thousand seven hundred and fourteen feet and seven and three-quarters inches (420,-714 ft., $7\frac{3}{4}$ in.) and no more. The majority thereof required by said Act to be represented on said petition by "owners" thereof, is two hundred and ten thousand three hundred and fifty-eight feet (210,358 ft.).

VIII. To said petition is subscribed a large number of names, opposite to each of which is written the number of feet of frontage for which the subscriber signs. The total of these figures, exclusive of frontage duplicated in said petition, is 223,527 feet and $\frac{1}{4}$ of 1 inch. In addition, there are a few signatures, opposite which no number of feet of frontage is written. The total frontage of property within said district assessed to such subscribers on the last preceding annual assessment roll is 3,399 feet and 2 inches. The total frontage thus represented on the petition is 226,926 feet and $2\frac{1}{4}$ inches.

* 13 * IX. Within said district of assessment were 19,796 feet and $\frac{7}{8}$ of an inch of frontage not heretofore mentioned, of which, according to the last preceding annual assessment roll, those persons, or some of them, were owners who had subscribed for the 223,527 feet and $\frac{1}{4}$ of 1 inch, but none of said frontage of 19,796 feet and $\frac{7}{8}$ of an inch was mentioned by the subscribers on the face of the petition; but those frontages only which combine to make said 223,527 feet and $\frac{1}{4}$ of an inch.

X. Hitherto the question of ownership has not been regarded, but by Section 5 of the Act, it is required that the persons subscribing the petition shall be "owners," as the same are, or shall be,

named in the last preceding annual assessment roll for the State, City and County taxes. Out of the two hundred and twenty-three thousand five hundred and twenty-seven feet and ¼ of 1 inch, ostensibly signed for on the petition by or on behalf of "owners," but one hundred and eighty-one thousand and forty-three feet and five inches are assessed upon the said assessment roll, to the persons by or on behalf of whom the subscription purports to be made. If to this sum we add the nineteen thousand seven hundred and ninety-
* 14 six feet and seven*-eighths of an inch mentioned in Finding IX., and the three thousand three hundred and ninety-nine feet and two inches mentioned in Finding VIII., the grand total of property apparently represented on the petition by "owners," as defined in the Act, would be but two hundred and four thousand two hundred and thirty-eight feet and seven and seven-eighths inches, which is not a majority of the frontage. In the amount last mentioned is included nineteen thousand seven hundred and ninety-six feet and seven-eighths of an inch, not subscribed for on the petition by those who indicated themselves thereon as owners of certain other feet of frontage, for which they did subscribe.

I, therefore, deduct this amount, and find the amount of frontage subscribed on the face of petition by or on behalf of "owners," as defined in said Act, to be but one hundred and eighty-four thousand four hundred and forty-two feet and seven inches.

XI. On comparing the petition with assessment roll, for the purpose of ascertaining whether the subscription made thereon, by or *on behalf* of "owners," as defined in the Act were made by them per-
* 15 sonally, it appears that numerous subscriptions thereon were * not so made, but were made by others, as follows: 5,969 3-12 feet of frontage, signed for by "attorneys in fact;" 6,161 11-12 feet of frontage, by "attorneys;" 986 9-12 feet of frontage, by "agents;" 43,859 feet 3-4 inches of frontage, by "presidents of corporations;" 526 feet of frontage, by "administrators;" 138 feet of frontage, by "an executor;" 618 9-12 feet of frontage, by a "devisee;" 77 6 12 feet of frontage, by "a guardian."

There are also five thousand eight hundred and sixty-eight and six-twelfths feet, signed on behalf of owners by persons other than "owners," who do not state that they sign in any respresentative capacity whatever; and there are four thousand seven hundred and sixty-five and two twelfths feet signed for by persons to whom no property is assessed on said assessment roll. The total amount of signatures *on behalf* of "owners," or of property on said petition, not signed for by them, personally, as mentioned in this finding, is sixty-eight thousand nine hundred and seventy feet and ten and and three quarters inches. On deducting this sum from one hundred and eighty-four thousand four hundred and forty-two feet and seven inches, allowed in finding X., I find there are but one hundred and fifteen thousand four hundred and seventy-one feet, eight inches
* 16 and 1-4 of an inch* of frontage on said petition signed for by owners, as they are defined in said Act.

XII. After the filing of said petition, the persons at that time filling the offices respectively of Mayor of said city, Tax Collector and Surveyor, met together, and signed a certificate to the effect

that the said petition had been signed by the owners of a majority in frontage of the property described in section four of said Act, as said owners were named in the last preceding annual assessment roll for State, City and County taxes.

XIII. Said Mayor, Tax Collector and Surveyor, then attempted to organize, as a Board of Public Works, and did in fact, go through the form of so organizing and of opening said avenue, and of seizing private property therefor, and of assessing the benefits conferred on the property within said district for the purposes of taxation; and of making a report, as provided in section six of said act.

XIV. Said report was left at the office of said Board for thirty days, and the notice thereof required by section 6 of said Act, was given, and said report was thereafter filed in the County Court of
* * 17 the City and County of San * Francisco, and was confirmed by said Court.

XV. The said Mayor, Tax Collector and Surveyor, assuming to act as a Board of Public Works, did make a report as provided in section 6 of said Act, wherein they gave a description of the premises in controversy, and did set against it the sum of three hundred and ninety-one dollars, being, according to the judgment and determination of said Board, the amount in which the said lot was benefited by reason of the taking and opening of said avenue, and the tax for the year 1878-9 was levied upon and according to said amount of enhanced values so fixed, as aforesaid, and for failure to pay said tax upon said value so assessed, said premises were sold by the Tax Collector of said City and County.

XVI. The said Montgomery Avenue tax was partly collected several successive years, but has not been enforced by a sale since 1881.

XVII. No petition to open said avenue, as required by said "Act," was presented to the Mayor of said City and County other than the aforesaid petition, which petition did not have the signature of the owners of the amount of property required by said Act.

Conclusions of Law.

* 18 *I. In the absence of such a petition as is prescribed by the statute to give jurisdiction to act the Board of Public Works provided for in the Act last mentioned, had no power to fix the enhanced value of the premises in controversy, on which amount the tax thereon for the fiscal year 1878-9 was imposed, and said tax on said premises was illegal and void.

II. The Tax Collector had no power to sell the premises for non-payment of said tax, and the sale and certificate and deed made by him to plaintiff, are, and each of them is, void.

III. The County Court of the City and County of San Francisco, in passing judgment upon said report, and confirming the enhanced value of said premises for the purposes of taxation, acted as a court of special and limited jurisdiction, and said judgment is void.

IV. The plaintiff was neither possessed nor seized of the premises in the complaint described on the 7th day of March, 1884, or at any other time, and defendant never ousted said plaintiff from the

possession thereof; nor has plaintiff been damaged in the sum of six
* 19 hundred dollars, * nor in any other sum.

V. The plaintiff is not entitled to recover the premises, and judgment must be entered for defendant, and for his costs to be taxed. Let judgment be entered accordingly.

November 11th, 1885.

LORENZO SAWYER,
Circuit Judge.

[Endorsed:] Filed Nov. 11th, 1885.

L. S. B. SAWYER, *Clerk.*

Judgment.

* 20 * UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, District of California.

HENRY ZEIGLER
vs.
THERON R. HOPKINS. } No. 3,259.

This cause having come on regularly for trial on the 28th day of November, 1884, being a day in the November, 1884, term of said Court before the Court sitting without a jury, a trial by jury having been expressly waived by written stipulation of counsel for the respective parties hereto, duly filed with the clerk of this Court, Daniel Rogers, Esq., appearing on behalf of the plaintiff, and P. G. Galpin, Esq., on behalf of the defendant, and the evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments of counsel, having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having filed its findings in writing, and ordered that judgment be entered herein in accordance therewith.

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that the plaintiff take
* 21 nothing * by this action; that the said defendant go hereof without day; and that Theron R. Hopkins, said defendant, recover from Henry Zeigler, said plaintiff, his costs in this behalf expended, taxed at ———

Judgment entered November 11, 1885.

L. S. B. SAWYER, Clerk.

[Endorsed:] I hereby certify that the foregoing is a full, true and correct copy of an original judgment entered in the above entitled cause.

Attest my hand and the seal of said Circuit Court, this 11th day of November, A. D. 1885.

[SEAL] L. S. B. SAWYER, Clerk.

Filed November 11, 1885.

L. S. B. SAWYER, Clerk.

Clerk's Certificate.

* 22 * UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, District of California.

HENRY ZEIGLER
v.
THERON R. HOPKINS. } No. 3,259.

I, Lorenzo S. B. Sawyer, Clerk of the Circuit Court of the United States, of the Ninth Judicial Circuit, within and for the District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the therein entitled action.

Witness my hand and the seal of said Circuit Court, this 11th day of November, A. D. 1885.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By F. D. MONCTON, *Deputy Clerk.*

[Endorsed:]

Judgment Roll.

Filed November 11th, 1885.

L. S. B. SAWYER, *Clerk.*
By F. D. MONCTON, *Deputy Clerk.*

Stipulation as to certain facts, etc.

* 23 * In the Circuit Court of the United States, in and for the District of California.

HENRY ZEIGLER
vs.
THERON R. HOPKINS. }

It is hereby stipulated and agreed by and between the parties plaintiff and defendant in the above entitled action, as follows:

First. The plaintiff is, and was, at the commencement of this action a citizen of the State of Ohio, and that the defendant is, and was, a citizen of the State of California.

Second. That the matter in dispute, exclusive of costs, exceeds the value of six thousand dollars.

Third. That the plaintiff is not seized of the premises in controversy, unless, and except it be by title, deraigned through and under a certain deed dated August 13th, 1883, from John H. Grady, Tax Collector, to S. F. Sinclair, and that said grantee is grantor of plaintiff.

Fourth. That plaintiff is seized in fee of said premises, if said deed is valid and effectual to convey title thereto.

* 24 Fifth. That said deed in the present action, solely, * and only for the purposes thereof, is open to attack upon the ground only, that the act of April 1, 1872, to open and establish a public street in the City and County of San Francisco, to be called Montgomery Avenue, and to take private lands therefor, is unconstitutional, and that

the Board of Public Works in said Act mentioned, had no power to organize or act, or value the premises for the purposes of assessment for want of the petition mentioned in section 5 thereof, and that the County Court of the City and County of San Francisco, had no power to render the judgment rendered by it, confirming the proceedings of the Board of Public Works in regard to opening said avenue, and all other objections to said plaintiff's title and to said deed are waived.

Sixth. On the trial defendant may prove any fact which tends to invalidate said judgment or said power to convey.

Seventh. That the defendant was in possession of said premises at the commencement of this action, and that said premises described in said tax deed, are within the district of assessment as defined in said Act for opening said avenue.

Eighth. That either party may read from the records in Mulligan vs. Smith, and Mitchell vs. Durterbe in the State Courts, such
* 25 evidence as he may be advised, subject to all legal * objections to the substance thereof.

Dated August 14th, 1884.

DANIEL ROGERS,
Attorney for Plaintiff.
WILLIAM F. GIBSON,
Attorney for Defendant.

[Endorsed:] Filed Nov. 28, 1884, L. S. B. Sawyer, Clerk.

Bond on Writ of Error.

* 26 * In the Supreme Court of the United States of America.

HENRY ZEIGLER,
Plaintiff in Error,
vs.
THERON R. HOPKINS,
Defendant in Error.

Know all men by these presents, that we, F. K. Simon, of the City and County of San Francisco, State of California, and Charles Collisehoun of the City of Oakland, County of Alameda, State of California, are held and firmly bound unto Theron R. Hopkins in the sum of Five hundred ($500.00) Dollars, to be paid to the said Theron R. Hopkins, his executors or administrators, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents, sealed with our seals, dated this 21st dav of November, A. D., 1885.

* 27 * Whereas, Henry Zeigler hath prosecuted a writ of error to the Supreme Court of the United States of America, to reverse the judgment rendered in the above entitled action by the Circuit Court of the United States for the District of California.

Now therefore, the condition of this obligation is such, that if the above named Henry Zeigler shall prosecute his said writ of

error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

F. K. SIMON.
J. COLLISEHOUN.

Signed, sealed and delivered in the presence of—
F. D. MONCTON.

Bond is satisfactory to defendant,

PHILIP G. GALPIN,
Of counsel.

UNITED STATES OF AMERICA,
District of California, ss.

* 28 F. K. Simon and Charles * Collisehoun being duly sworn, each for himself, and not for the other, deposes and says that he is worth the sum of Five hundred ($500.00) Dollars, exclusive of property exempt from execution, and over and above his just debts and liabilities.

F. C. SIMON.
J. COLLISEHOUN.

Subscribed and sworn to before me this 23d day of November, 1885.

F. D. MONCTON,
Commissioner of U. S. Circuit Court, Dist. of Cal.

[Endorsed:] The form of the within bond and the sufficiency of the sureties thereon are hereby approved.

L. S. B. SAWYER,
Clerk.

Filed November 23d, 1885.

L. S. B. SAWYER,
Clerk.

Clerk's Certificate to Return.

* 29 * In the Circuit Court of the United States, for the District of California.

HENRY ZEIGLER,
Plaintiff.
v.
THERON R. HOPKINS,
Defendant.

I, L. S. B. Sawyer, Clerk of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the District of California, do hereby certify that the foregoing twenty-eight written pages, numbered from 1 to 28 inclusive, are a full, true and correct

copy of the record and of all proceedings in the above entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said Circuit Court, this first day of December, A. D. 1885.

[SEAL.] L. S. B. SAWYER, *Clerk*.

Endorsement on Cover. No. . Henry Zeigler, Plaintiff in Error vs. Theron R. Hopkins, Defendant in Error. Transcript on Writ of Error. Filed

117-60

Office Supreme Court U. S.
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JAMES H. McKENNEY.
CLERK.

No. .....

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

HENRY ZEIGLER,
PLAINTIFF IN ERROR,

vs.

THERON R. HOPKINS,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

DANIEL ROGERS,
ATTORNEY FOR PLAINTIFF IN ERROR.

E. F. PRESTON,
OF COUNSEL.

WM. F. GIBSON,
ATTORNEY FOR DEFENDANT IN ERROR.

PHILIP G. GALPIN,
OF COUNSEL.

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1885.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

HENRY ZEIGLER,
PLAINTIFF IN ERROR,

vs.

THERON R. HOPKINS,
DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is an action of ejectment based upon a tax deed issued under the provisions of Sec. 11 of the Statute hereinafter recited.

The questions involved are as to the admissibility in evidence, and the effect of the petition read by defendant on the trial of this case.

The Legislature of the State of California, passed an act, entitled, "An Act to open and establish a public street in the City and County

of San Francisco, to be called "Montgomery Avenue," and to take private lands therefor."

Approved April 1st, 1872. Statutes of 1871-72 72, page 911.

By this Act a certain piece of land particularly described therein was taken and dedicated for an open and public street.

Section 4 of the Act particularly described the lands which were to be assessed to pay the cost of opening said street.

By section 5, it was presided that, "whenever the owners of a majority in frontage of the property described in Section 4 of this Act as said owners, are or shall be named in the last preceding annual assessment roll for the State, City, and County taxes, shall petition the Mayor of said City and County, in writing, for the opening of Montgomery Avenue, according to the provisions of this Act, the Board of Public Works, as created by Section 19 of this Act, shall proceed to organize by the election of a President."

Section 19 provided, "that the Mayor, the Tax Collector, and the City and County Surveyor of the City and County of San Francisco, shall be and are hereby created a Board of Public Works within the meaning and intent of this Act, and as such Board are hereby authorized, empowered,

and directed to perform all and singular the duties herein enjoined upon the Board of Public Works as herein provided."

The duties enjoined on the Board were defined by the Act, and it was provided, that a report should be made by the Board of the proceedings, and when completed, that it should remain in the office of the Board for thirty days, for the free inspection of all parties interested, and that notice thereof should be published by said Board for twenty days in two daily newspapers printed and published in said City and County.

In pursuance to Section 7 of said Act, the report was filed with the County Court, and after the proper proceedings had thereon the same was confirmed by a judgment entered by said County Court.

ASSIGNMENT OF ERRORS.

I.

That the findings of fact do not sustain the judgment.

II.

That the decision of the Mayor, that the petition was signed by a majority as required by the Act of the Legislature of the State

of California, entitled: "An Act to open and establish a public street in the City and County of San Francisco, to be called "Montgomery Avenue" and to take private lands therefor," approved April 1st, 1872, is so far conclusive that the same can not be disputed in this action, and that the evidence to the contrary should have been disregarded and excluded.

III.

That the judgment of the County Court, in confirming the report of the Board of Public Works, after the notice required by Section 6 of the said Act was given, was a final adjudication of the same, and no appeal having been taken therefrom, the question of the validity of said petition is *res adjudicata*.

POINTS AND AUTHORITIES FOR PLAINTIFF IN ERROR.

I.

The Certificate of the Mayor, that the petition presented was signed as required by the Act of the Legislature was conclusive, and precluded any evidence as to the sufficiency of the petition.

This point involves the real and important point in the case. The determination of the question was a condition precedent to the organization of the Board of Public Works, and to all the duties imposed upon it by the Act.

Finding XII—transcript, page 9—states, "after the filing of said petition, the persons at that time filing the offices respectively of Mayor of said City, Tax Collector and Surveyor met together, and signed a certificate to the effect that the said petition had been signed by the owners of a majority in frontage of the property described in Section 4 of said Act, as said owners were named in the last preceding annual assessment roll for State, City, and County taxes."

The Act required this inquiry and determination to precede the performance of the duties required, and such determination is conclusive when collaterally called in question.

But the question is effectually settled by authority, based upon reasoning which will commend itself to the judgment of any Court. The authorities we cite from the decisions of the U. S. Supreme Court, are only a few of the many cases to the same effect, decided during a long series of years by that Court.

A leading case, but not the earliest, is

Knox *vs.* Aspinwall, 21 How., 539.

Says the Court: "The case assumes that the requisite notices were not given of the election, and hence that the vote has not been given in conformity with law."

The law required the vote of a majority at an election to be held pursuant to a specified notice

The Court inquired who was to determine. whether the election was properly held, and a majority of votes cast in favor of the proposition —whether it was to be determined in a collateral way, in every suit on a bond or coupon, or by the Board of Commissioners before making the subscription for which bonds were issued. It is then said;

"The Court is of opinion that the question belonged to this Board * * * that after the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds, in this collateral way."

It is safe to say that that case has been cited and approved by that Court, in more than fifty cases; and there is no subsequent case in that Court, questioning the doctrine above cited.

It will be noticed, in examining the cases, that the law, in scarcely any instance, *expressly*

committed to any tribunal, board or officer, the decision whether the conditions precedent had been performed ; yet the Court invariably holds that the question *must* be decided and *definitively* decided, before the bonds issue, and therefore holds that the power is granted by necessary implication.

In Knox *vs.* Aspinwall, it is said that "the ascertainment of the fact was *necessarily* left to the inquiry and judgment of the Board itself, *as no other tribunal was provided for that purpose.* In

Rock Creek *vs.* Strong, 96 U. S., 277,

held that if Town Clerk and Treasurer were not to determine result of election, then duty devolved on the Commissioners.

Bissel *vs.* C. Jeffersonville, 24 How., 288,

is a clear and instructive case.

It was there proven that the requisite three-fourths of the votes *had not* signed the petition.

Yet it was held that the Common Council, to which the petition was addressed, and which issued the bonds, determined the question of the signature to the petition—that it *necessarily* fell to the Common Council to determine the question.

See also

Mercer Co. *vs.* Hackett, 1 Wall., 92;

Co. of Ray *vs.* Vansyckle, 96 U. S., 687;

Orleans *vs.* Platt 99 U. S., 681.

In the last two cases it was held that the County Court, though not expressly authorized so to do, must determine the question of the performance of the conditions precedent.

See also

Lynde *vs.* The County, 16 Wall., 13;

Commissioners *vs.* January, 94 U. S., 205.

In the case of

Block *vs.* Commissioners, 99 U. S., 695,

the Commissioners, on canvassing returns, declared as the result of the election, a majority in favor of the issue of bonds. The returns from one township had not then been received, but were received before the issue of bonds. *Held that the result as declared* was conclusive, in an action by a bond-holder.

It is said by the Court in

Coloma *vs.* Eaves, 92 U. S., 484–8—

The duty of ascertaining whether the requisite vote had been given was plainly intended to be vested somewhere, *and once for all.* As the only persons who have any duties to perform respecting the election are *Town Clerk* and *Supervisor*, it will be presumed that the Legislature intended that *they or one of them*, should determine whether requirements of the Act, prior to subscription had been performed.

There are several cases in the Supreme Court of the United States, in which the statutes

require the presentation of a *petition* to some officer, Court or board.

Town of Venice *vs.* Murdock, 92 U. S. 496,
Bissell *vs* Jeffersonville, 24 How., 287,
Van Hostrop *vs.* Madison, 1 Wall., 297,
Orleans *vs.* Platt, 99 U. S., 682,
Pompton *vs.* Cooper Union, 101 U. S., 197,
School District *vs.* Stone, 106 U. S., 187,
Multclair *vs.* Ramsdell, 107 U. S., 158,

Referring to Sec. 5 of the Act, it will be seen that the petition is to be signed by the *owners of a majority in frontage* of the property in the district, *as said owners are named in the last assessment roll.*

The petition is not required to contain a description of the property of the severa petitioners.

Nor the amount of frontage represented by each.

Nor does the law say that the petitioners shall severally represent the property assessed to them, in the last assessment roll.

Nor does the law require the assessment roll to state the frontage of property.

Nor does the Act of 1872 make any statement of the frontage, that may happen to be found in the assessment roll, evidence of the frontage of any lot, for the purposes of the petition.

The officer, board, or tribunal, whose duty it is to pass upon the petition, is required to *find* the following facts :

The entire frontage of the property within the district.

The genuineness of the signatures.

Whether those persons appeared on the last assessment roll.

Their authority to sign, when they sign for others, or in any representative capacity.

And the amount of the frontage of the lots owned by the several petitioners.

The third fact is to be determined by comparing the petition with a public record—the assessment roll.

The determination of all the other facts depends upon conclusions to be drawn from the examination of evidence—requires the exercise of discretion and judgment.

Witnesses must be called, surveyors employed, inspections and examinations must be made, and thereupon a determination must be made by the proper officer, board, or tribunal.

II.

The judgment of the County Court, confirming the report of the Board of Public Works, after the notice required by Section 6 of the Act was given, was a final adjudication of the same.

The facts necessarly involved in the proceedings before the County Court ; and of which the judgment was a final adjudication, were as follows :

Whether a petition was in fact presented to the Mayor as required by Section 5 of the Act; whether the Board organized as provided ; whether the report was made by the Board ; whether the report was left on file in the office of the Board for inspection ; and whether the notice thereof was published as required by Section 6 of the Act.

The defendant in error, can not now inquire into the sufficiency or validity of the petition, and is estopped to deny the legality of the proceedings of the Mayor or Board of Public Works.

Orleans *vs.* Platt, 99, U. S., 681.

County of Ray *vs.* Vansyckle, 96, U. S., 687.

Rogers *vs.* Burlington, 3 Wall., 667.

Meyer *vs.* City of Muscatine, 1 Wall., 392.

Dill. Munic. Bonds § 23.

Respectfully submitted,

DANIEL ROGERS,

Attorney of Plaintiff in Error.

E. F. PRESTON,

Of Counsel.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

HENRY ZEIGLER

V.

THERON R. HOPKINS.

In Ejectment.

Points and Brief for Defendant in Error.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

HENRY ZEIGLER,
Plaintiff and Plaintiff in Error.

v.

THERON R. HOPKINS,
Defendant and Defendant in Error.

In Ejectment.

Points for Defendant.

I.

The Supreme Court of the State of California having decided, in Mulligan *v.* Smith, 59 Cal., 206, the precise points here arising, the Federal Courts will not overrule but will follow that decision.

Supervisors *v.* United States, 18 Wall., 81, citing Brightly's Federal Digest, 163.
Green *v.* Neals, Lessee, 6 Peters, 291.
Suydam *v.* Williamson, 24 How., 427.
Leffingwell *v.* Warren, 2 Black, 599.
McKeen *v.* DeLancy, 5 Cranch, 22.

II.

Until the petition required by the 5th Section of the Montgomery Avenue Act had been sub-

scribed by the owners (as defined in said Act) of a majority of the frontage of streets within the district of assessment, the alleged Board of Public Works could have no legal existence, nor exercise any powers.

III.

The petition itself, and the signatures appended thereto, were properly admitted in evidence as the best proof of their existence, and the annual assessment roll for State, City and County taxes, last preceding the filing of said petition, was properly admitted as the best proof of the ownership of the signers of the petition.

IV.

The foregoing proofs were not rendered inadmissible, nor was the defendant estopped from offering them, nor as evidence are they outweighed

1. By the certificates jointly or severally of the Mayor, the Tax Collector and the City and County Surveyor, that said petition had been subscribed by the owners of a majority in frontage, etc.

2. Nor by the Report of the Board of Public Works, and the judgment of the County Court confirming the same.

V.

In case any judgment should be rendered establishing the validity or legality of the so-called Montgomery Avenue Bonds, that judgment could not be paid out of tax sales of property within the district through proceedings contemplated in said Act; for, the valuations not being

made by authority of law, the tax could not be enforced. Such judgment would not be a lien on the property of individual citizens. The judgment creditor would be in the position of the plaintiff in Supervisors *v.* United States, 18 Wall., 72, who, having recovered a judgment for $19,946 against Carroll County, Iowa, upon sundry county warrants issued for the ordinary expenses of the county, sued out a mandamus to compel the Board of Supervisors to levy a special tax. The Board returned answer that they had no power to levy the tax required. The Circuit Court ordered the levy of the tax. This Court reversed the decision on the ground that "a writ of mandamus can compel the performance only of some act which *the law authorizes.*" (*Id.*, p. 83, at bottom of page.) To the same effect is the opinion in U. S. *v.* County of Macon, 99 U. S. 590, 591.

BRIEF.

The plaintiff brings ejectment, relying upon a tax deed, made after sale of the premises for non-payment of Montgomery Avenue assessments.

CONSTRUCTION OF THE MONTGOMERY AVENUE ACT.

The validity of the title depends upon the construction of the act of April 1, 1872, p. 911. This act provides for opening a street in the city of San Francisco; for taking private lands therefor; and for paying for the same; also, for the selection of Commissioners to transact that business, who are designated "a Board of Public Works." They are authorized to devise and use a seal, and to

issue bonds in payment of property taken and expenses incurred. The Commissioners are not *named* in the act, for they were to be the persons who should respectively fill the offices of Mayor, Tax Collector, and City and County Attorney, at that period of time when (if ever) a petition should be presented to said Mayor for opening said street as hereinafter mentioned. If no petition was ever presented, the power given by the act would never vest for want of a nomination of the donees of the power.

The Act provided the entire machinery for carrying its purposes into effect, subject to the condition that the machinery should not move until the people within the district of assessment signified their consent in writing to the proposed improvement by filing their petition therefor with the Mayor.

According to the scheme of the Act, the burthen arising from the cost of the improvement was to be imposed upon a limited area within the city and to be adjusted according to "benefits conferred;" that is, on a basis of "enhanced valuations" to be established by conjecture; the Act, therefore, wisely provided that the people of the district to be taxed should for themselves decide whether they were willing to incur taxation to secure the benefit anticipated from the improvement proposed. Says Cooley on Taxation, p. 464: "A common requirement is that the improvement shall be asked for, or assented to, by a majority or some other proportion of those who would be taxed. The want of a compliance with

this requirement is fatal, at any stage of the proceedings."

Upon a former argument in another case, it was claimed by our opponents that as soon as the Act of April 1, 1871, was approved, the powers thereby created vested in the Board of Public Works; and for them to act without the petition required, was a mere irregularity in the exercise of power conferred: that such irregularity being in the exercise and not in the acquisition of power, their proceedings were valid.

To this we say, that although the powers that were to vest in the Board of Public Works were defined (created, if you please), by the Act, these powers could not vest, until the persons in whom they were to vest were named; until that time the donees of the power were unknown. These donees were in effect to be appointed by the property holders, for they were to be the persons who chanced to fill the respective offices of Mayor, Tax Collector and City and County Surveyor, "whenever," that is, at the time when, the required petition should be filed. By hastening or retarding the filing of the petition, the property holders could change the donees of the power, and it is therefore idle to say that any powers, by the Act conferred, vested in any one at the date of the approval of the Act. Until the filing of the petition, the donees of the power were not selected; and therefore until then no power vested.

The 5th Section of the Act reads as follows:

"*Whenever* the owners of a majority in front age of the property described in Section Four of this Act" (being the Assessment District), "* * * shall petition the Mayor of said City and County in writing for the opening of Montgomery Avenue, the Board of Public Works, as created by Section 19, &c., *shall proceed* to organize, and immediately *thereafter* it shall demand and these shall be delivered to it * * * all books, maps, papers, diagrams, plats, surveys, abstracts, muniments of title, reports, and all other matter relative or appertaining to the taking and opening of said avenue." The Act then declares the duties thereafter to be performed by said board.

Section 19 of the Act does not direct the board to organize and act, but declares that the members of it shall be the Mayor, Tax Collector and City and County Surveyor; who are authorized and directed to "perform the duties enjoined upon the Board of Public Works." The first duty as prescribed by Section V, is "to organize." When? "Whenever a majority shall petition." "Whenever, is an adverb of time and means *at the time when*." *Vide* Webster's Dictionary.

It is thus seen that according to the *letter* of the statute—the filing of the petition is a condition precedent to the organization of board.

So also is it, according to the *spirit* and *intention* of the Act. The consent of the property holders is especially provided for in the Act—the consent is to be made *in writing*—to be made public by *a delivery* to the head of the city gov-

ernment; and *after* the consent given the board is to organize. It can not be disputed that the intent of the provision was to permit the property holders to decide whether or no they were willing to be taxed. If the Act be construed to mean that the Board could organize, act, and create a lien upon property, without a petition, the obvious purpose of the Legislature in providing for the filing of the petition prior to any organization of the board is defeated—and this legislative safeguard against abuse of the taxing power is swept away by judicial construction.

AUTHORITY.

If this Court is still in doubt as to whether the petition is a condition precedent to the exercise of the taxing power, the question is settled by the authority of Mulligan *v.* Smith, 59 Cal., 206. In that case the Supreme Court of the State, construing a State statute, in regard to a local improvement, held that the filing of the petition was a condition precedent to the exercise of any power by this same Board of Public Works. On such a question, the Federal Courts usually follow the decision of the State Tribunals.

18 Wall., 81–2.

But, as an original proposition, this part of the decision in Mulligan *v.* Smith, is correct, and is sustained by the case of Carrol Co. *v.* Smith, 111 U. S., 657. In fact, in all the cases relative to municipal bonds which can be cited on the other

side, it is conceded that the "election" or "subscription" was a condition precedent—the point everywhere made, is, in regard to proof of the existence of the precedent facts—as to whether they are established or not by recitals in the bonds. Upon the proposition that the consent of the taxpayer is a condition precedent to the exercise of the taxing power, when such consent is provided for in the Act, delegating the power, and without such consent the tax is void, we cite:

Cooley on Taxation, p. 464.
Mulligan *v.* Smith, 59 Cal., p. 206.
Suvrill *v.* Grattan, 52 Cal., 97.
Sharp *v.* Spier, 4 Hill, 86–9.
Gridley *v.* Otis, 2 Hill, 468, note.
Litchfield *v.* Vernon, 41 N. Y., 136.
Matter of Sharp, 56 N. Y., 258.
Holland *v.* Mayor of Baltimore, 11 Md., 194.
Kensington *v.* Keith, 2 Barr., 218.
Pittsburg *v.* Walters, 69 Penn., 365.
Mayor *v.* Esbach, 18 Md., 281.
Henderson *v.* Mayor, 8 Gill., 359.
Damp *v.* Town of Dane, 29 Wis., 427–8.
Matter of Garvey, 77 N. Y., 523.
People *v.* City of Brooklyn, 71 N. Y., 496.
Welbro *v.* N. Y. Cent. R. R., 76 N. Y., 182.
People *v.* Suffern, 68 N. Y., 323.
Hassam *v.* City of Rochester, 67 N. Y., 531.

Merrit *v.* Village of Port Chester, 71 N. Y., 311.
People *v.* Gillies, 68 N. Y., 324.
People *v.* Spencer, 55 N. Y., p. 1.
Powers' Appeal, 29 Mich., 509.
People *v.* Castro, 39 Cal., 65.
Hewes *v.* Reis, 40 Cal., 255.

The seizure by the State of the property of the citizen in the exercise of the taxing power is in derogation of his common law right; and every pre-requisite having the semblance of benefit to him must be complied with:

Hewes *v.* Reis, 40 Cal., 263.
Atkins *v.* Kenner, 20 Wend., 269.
Culver *v.* Hayden, 1 Vt., 364.
Newell *v.* Wheeler, 48 N. Y., 586.

We conclude that from the letter, and the spirit of the Act, from an authority conclusive upon a Federal Court, and from the authorities above cited, it is demonstrated that the Act must be so construed that the filing of the consent of the property-holders to the opening of the Avenue, and to consequent taxation, is a condition precedent to the exercise of any power defined or created by the Act; and that the action of the alleged Board of Public Works in valuing the premises for the purposes of taxation was without authority of law, unless the petition provided for in the Act had been presented to the Mayor.

Proofs as to Petition.

As the plaintiff claimed to divest the title of the defendant by a deed made under a power conferred upon the Tax Collector by statute, it devolved on him to prove that the conditions existed which were precedent to the vesting of such power; this involved proof, that the requisite petition had been filed. This proof is entirely matter of record, and consisted of the official map of the City and County of San Francisco, from which to determine the number of feet of frontage within the district; a certified copy of the petition with the names of the subscribers thereto, and in a separate column and opposite the names of most of petitioners, the number of feet of frontage for which they subscribed; and, thirdly, the assessment roll of the City and County of San Francisco, showing who were the owners of the different parcels of land within the district at the date of the filing of the petition.

The last item of evidence was offered because the act provided that the petition was to be signed by the owners of the property within the district of assessment "as said owners are or shall be named in the last annual preceding assessment roll."

The ascertainment of the number of feet of frontage within the district, and the examination and comparison of the signatures to the petition, with the owners as named in the assessment roll, were referred to the Master in Chancery of the Court appointed as a referee by stipulation, prior

to the trial. He made a long and careful report, showing in tables annexed thereto the number of feet in the district, and which of the subscribers to the petition were the owners of the lots for which they had signed, according to the definition of owners contained in the act.

It appeared, therefrom, that there were within the district of assessment 420,714$^{7\frac{1}{2}}$ feet of frontage. So that by the act 210,357 feet were required to be signed on the petition by persons to whom the property for which they signed was assessed upon said assessment roll. The total number of feet apparently represented on the face of the petition was 226,926$^{2\frac{1}{2}}_{12}$ feet, but of these signatures but 204,238$^{7\frac{1}{2}}_{12}$ feet was signed for by owners and persons professing to represent them; as owners are defined in the act. On deducting signatures of those who profess to sign in a representative capacity, and those who make no statement of the capacity in which they sign, and those who sign, twice or more times, it appeared affirmatively that out of the 210,357 feet frontage of signatures required by the act, but 115,47$^{8\frac{1}{2}}_{12}$ feet were entitled to be counted as signatures upon the petition.

As to Estoppels.

The plaintiff relied upon three certificates, signed respectively by the Mayor, the Tax Collector and the City and County Surveyor, to the effect that a majority in frontage of the property owners, had

signed the required petition and had filed it with the Mayor, prior to the organization of the Board of Public Works. These certificates are recorded in the proceedings of the Board. He relied also, upon the existence and action of the Board; upon the recitals in bonds issued by them; upon a report, made by the Board of Public Words to the County Court; and also, the judgment of the Court thereon—as being evidence conclusive, or at least *prima facie*, that the petition required had been filed.

The fact being that no legal petition was presented; that the property holders did not consent to taxation; the question presented is, whether the acts, votes, certificates, bonds, reports or judgment made or issued, prove or tend to prove that the petition was filed?

If so, then it is by reason of the application to the case of either the doctrine of estoppel, or of *res adjudicata*, or of ratification.

The defendant has done nothing in regard to these certificates, votes, bonds, reports or judgments; and if he is barred or affected thereby, it must be because the persons performing such acts had some authority from the defendant or the statute, whereby they had power to affect his interests.

They had none from him personally—and the only question left, is, did the law confer upon these persons, power, in the absence of the defendant to estop him from proving that a petition had not

been signed, or to adjudicate as against him that it had been?

As to the Certificates.

The office of Mayor was created by the statute of April 2, 1866, p. 718. His duties by statute, are to act as "presiding officer of the Board of Supervisors," "to sign election proclamations," and by custom to pose as the head of the Municipal Government on various festive occasions from the annual Fourth of July procession to the laying of a corner stone. Neither by statute nor custom has he power, as a city official, to write letters or certificates which in a Court of Justice, may become evidence of facts which come within his observation. Such power is neither expressly given to him *by general law*, nor is it necessary to the exercise of any power thereby conferred. It was not necessary, *under this act*, in order to enable him to organize the Board of Public Works. If the petition was filed, the Board could have organized. If the petition was not filed, no power express or implied vested in him, to adjudicate in regard to it. If such power was vested, the certificate could be substituted for the petition; and if such substitution was legal, the consent of the Mayor took the place of the consent of the property holders. With equal force the same remarks apply to the certificates of the Tax Collector and the Surveyor.

Of course, each of these gentlemen had to determine for himself whether he would assist in

organizing the Board of Public Works; but by putting the result of his reflections into writing, he could not adjudicate the fact that the petition had been filed, so as to make any evidence of that fact *to bind others.*

Furthermore, if the certificates are founded upon an inspection of the map, the petition and the assessment roll only, the certificate is merely the opinion of the Mayor as to results deduced therefrom; and is no better proof than the evidence from which he made his deduction. All are equally matter of record. If he took other proofs, he had no power to do so, for the law did not give it to him. Since he had neither power to take proofs nor render a decision thereon, his decision could affect no one but himself. That an unauthorized certificate is not evidence, was decided in Mulligan *v.* Smith, 59 Cal.; People *v.* Hagar, 49 Cal., 232; Sharp *v.* Spier, 4 Hill, 88.

If the Mayor, the Tax Collector and the County Surveyor, could thus certify themselves into office as a Board of Public Works, they could only do so by virtue of an authority conferred upon them by statute, other than the Montgomery Avenue Act. *No such statute exists.* To assume that they did it as members of the Board of Public Works, and under the authority of the act is the fallacy of the *petitio principii.* The point thus made by defendant, is this: "Being members of the Board of Public Works, the certificate is authorized; and the certificate thus authorized proves that they were members of the Board. The

Board being thus proven to exist, every step essential to its legal existence must be intended to be established."

As to Proof of Power from the Existence and Action of the Board.

If the Board, by certificates and recitals, could not determine as against a property holder, that the conditions precedent to its legal existence had been performed, it is manifest that any other assertion by them of legal existence, is equally impotent.

Our proposition is, that no man who asserts the existence in himself of power to create a lien upon, or convey away the title of another, can prove the power by his own unaided conduct or declarations while executing it.

He must first show, outside of his recitals and acts, that power to convey was vested in him, either by law, by the person affected or his predecessors.

In Sharp *v.* Spier, 4 Hill, 86, Judge Bronson says: "Every statute authority in derogation of the common law, to divest the title of one and transfer it to another, must be strictly pursued, or the title will not pass. This is a mere *naked power* in the corporation, and its due execution is not to be made out *by intendment; it must be proved.* It is not a case for presuming that public officers have done their duty, but what they have *in fact done must be shown. The recitals* in the convey-

ance are *not evidence* as *against the* owners of the property, but the fact recited *must be established by proofs* ALIUNDE. * * * He must show, step by step, everything which has been done which the statute makes essential to the due *execution* of the power."

Now, if recitals made by officers authorized to execute, will not prove the *execution* of a power vested, how much less can recitals of usurpers prove the vesting of power in themselves. The proposition comes to this: "Having no power to execute the instrument, they do so, and by its recitals determine that they have power to execute." In other words, they recite themselves into office *by an instrument they have no power to make.*

But if their recitals, while professing to execute the duties of their office, are not evidence for want of authority to make them, it is obvious that their actions, being also without authority, do no more effectually bind the property holder.

The law has never yet been declared that the recitals of a tax deed even, bind the title, save where, *by statute*, such recitals are made evidence.

RECITALS OF BONDS.

We are aware that there are decisions of the Supreme Court of the United States to the effect that where county or municipal bonds are in the hands of an innocent *bona fide* holder for value, *the obligor of the bond* may be estopped by its recitals.

But the point there arises upon the question whether a contract exists between the obligor of the bond and its holder. Here, the plaintiff must go further, and this is his argument: "The obligor is the corporation; the corporation is estopped by its own conduct or that of its officers. The corporation must pay. To pay, the tax must be enforced. It can only be enforced by a sale which shall be valid. To make it valid, the estoppel on the *municipality* and the *contract* must be transferred and become an estoppel on the *property holder*, and on *his denial of power* in the Tax-Collector to deed away his property. Therefore, the property holder is estopped from disputing the power."

No case can be found which decides the above propositions; but, if it could, it would not be applicable here, for various reasons.

I. This bond is not the bond of the city; on the face of the bond she does not promise to pay, but refers to the Act, which declares in the 24th section thereof: "It is hereby expressly provided, that the City and County of San Francisco shall not, in any event whatever, be liable for the payment of the bonds, nor any part thereof, provided to be issued under this Act; and any person purchasing said bonds, or otherwise becoming the owner of any bond or bonds, accepts the same upon that express stipulation and understanding."

Where the bond on its face discloses that the obligor is not bound, the *bona fide* holder for value cannot claim the benefit of an estoppel.

"Dealers in municipal bonds are charged with notice of the laws of the State granting powers to make the bonds they find on the market."

101 U. S., 695.

If there is no estoppel as against the city for the reason that she could not make the bonds or be made liable by reason of any recitals or expressions therein; equally is it true that there is no estoppel against the property holders, and this because they did not make any contract—they did not make any bonds. If the bonds are not bonds of the property holders, no recitals in the bonds could bind them.

As the doctrine of estoppel cannot be made use of to hold the city or property holders on the contract expressed in the bonds, the entire law in regard to the conclusiveness of recitals in bonds is outside this case.

We avoid the entire line of cases in the Supreme Court of the United States by the simple statement "that an estoppel by recitals, is only raised where the bond *on its face purports to bind the persons estopped.*"

It will be observed that this bond is not under the seal of the city, but under that of the Board of Public Works; that it is executed and issued by that Board.

Assuming that the city has power to bind herself by her bond, and that the bond executed is good in form to bind her, then it is clear that the act done comes within the powers delegated to her; and the recitals are conclusive upon her; but if the bond is not made under the seal of the city, nor by corporate authorities possessed of plenary power, but by agents for her, created for the occasion, the question is whether the power exercised by the agents comes within those delegated to *them*. The distinction is pointed out, and the application of it is shown in Wilson *v.* Salamanca, 99 U. S., 504.

It is manifest that the Board of Public Works, not being governmental officials of the city, can have no plenary power to bind her; it is clear that, by the Act constituting the special agency, that agency is limited, and does not extend to bonds or recitals therein, binding the city. Equally clear, also, it is, that this Board has no governmental functions to perform over the geographical district of the assessment, nor any plenary power over it, nor any authority to issue bonds which shall bind the property holders.

In the case of the Northern Bank of Toledo *v.* Porter Township, 110 U. S., 617, the Trustees of that township were authorized, in the event the County Commissioners did not subscribe for a certain railroad, to hold an election, and on a favorable vote, to issue bonds of the township. No special authority was given in regard to making recitals of performance of precedent acts. The

township voted, and the Trustees, who were officers of the township, clothed with ordinary governmental powers, issued bonds reciting that they were issued "in pursuance of the provisions of the several Acts of the General Assembly of the State of Ohio, and a vote of the qualified electors in said township of Porter taken in pursuance thereof." But the Court held that "until the County Commissioners refused to subscribe," there was no power conferred on the township to hold the election; and that the Trustees who issued the bonds had no power to adjudicate upon acts not performed by themselves. That in the absence of express power to adjudicate upon acts done or not done by others, the certificate could adjudicate upon acts within the scope of their own official functions, only.

The Court reviewing the older cases, says: "The adjudged cases examined in the light of their special circumstances show that the facts which a municipal corporation issuing bonds in aid of the construction of a railroad was not permitted against a *bona fide* holder to question in face of a recital in the bonds of, their existence were those connected with or growing out of the discharge of *the ordinary duties* of such of its officers as were invested with authority to execute them and which *the statute conferring the power made it their duty* to ascertain and determine before the bonds were issued; not merely for themselves as the ground of their own action in issuing the bonds, but equally as authentic and *final* evidence

of their existence for the information and action of all others dealing with them in reference to it. Such is not the case before us. Had the Statutes of Ohio conferred upon a township in Delaware County authority to make a subscription to the stock of this company upon the approval of voters at an election previously held, then a recital by its proper officers, such as is found in the bonds, would have estopped the township from proving that no election was in fact held; for in such case it would be clear that the *law had referred to the officers* of the township, not only the ascertainment, but the *decision* of the facts in the mode of executing the power granted. But in this case, power in townships to subscribe did not come into existence—that is, did not exist except where the County Commissioners had not been authorized to make a subscription. Whether they had been so authorized, &c., &c., were matters with which the Trustees of the township *in the discharge* of THEIR ORDINARY DUTIES, had no OFFICIAL CONNECTION, and which the statute had not confided to their final determination."

The Court there decides that the precedent failure of the County Commissioners to subscribe was a fact arising out of the "duties of *county* officers, and which the purchaser and all others were bound to know did not belong to the township to determine so as to confer or create power, which, under the law, did not exist."

The Court cites and approves McClure *v.* Township of Oxford, 94 U. S., 429, saying: "The

publication of the act plainly was not a matter with which the Township Trustees, as such, had any official connection. It was not *made their duty* to *have it published*. The time of publication would not *necessarily appear* upon the *Township Records;* but publication in a named newspaper was, as the face of the act showed, vital, not simply to the exercise, but the very existence of the power to subscribe."

We cite the foregoing to show simply that the theory upon which recitals bind the obligor is that the persons making them are not only officers of the corporation or district, and entrusted with the administration of its affairs, but that the estoppel of the recital extends only to acts performed by the officers *themselves*, or acts of others *with which such officers have some official connection in the course of their ordinary duties*, and on which it is a part of their ordinary official duty to decide; or else, of course, within some special statutory authority. If the Board of Public Works had power to ascertain and decide whether the petition had been duly signed, then the township officers had power to ascertain that the County Commissioners had not in fact subscribed. It was not any part of any ordinary official duty of the Board of Public Works to examine the petition and compare it with the assessment roll, for they were not *officers* entrusted with governmental function. Nor did the statute confer authority in regard to the petition. It was no more their duty to examine it than it was the duty

of the officials in McClure *v.* Township of Oxford to take the newspaper and examine it in regard to due publication. See also Anthony *v.* Jasper, 101 U. S., 693, 697.

II. In some of the earlier opinions in the United States Supreme Court, loose expressions fell out in regard to the existence of a sort of general agency held by public officials; and in regard to a ratification of their acts; but it appears from the opinions that the attention of the Court was not drawn to the distinction between private corporations chartered for purposes of private gain, whereof persons become members voluntarily, and consent to share the burthen of its debts in consideration of anticipated pecuniary recompense, and public corporations created by the State for governmental purposes whose burthens of debt are discharged by the exercise of the State power of taxation.

It is readily seen that in regard to the latter class of corporations, public policy requires a restraint upon their unlimited power to contract debts through officials elected for governmental purposes; for such debts must be collected by the exercise of the State power of taxation, from the property of the citizen unwilling; possibly from one who never voluntarily joined the public corporation, but found it imposed upon him by a higher power; who, possibly, never assented to, but as far as lay in his power, resisted the creation of the debt, for payment of which his property may be sold.

Accordingly, we find that, in Carrol Co. *v.* Smith, 111 U. S., 561, the Supreme Court of the United States, held, that where the Constitution of the State forbade the Legislature to authorize a county to lend its aid to a Corporation, unless two-thirds of the qualified voters should assent thereto, the plaintiff in error was not precluded by the recitals of the bonds from raising the question whether two-thirds had assented. "The recital was the above mentioned sum, being part of the subscription, etc., authorized by the following styled acts," etc.

So in Dixon *v.* Field, 111 U. S., 83, it was held that "there must be authority of law, by statute, for every issue of bonds of a municipal corporation as a gift to railroads." The point made against the bonds was, p. 87, "that the bonds were issued without authority of law and were void." The Court says: "There must be authority vested in the officers, *by law*, as to *each* necessary fact, whether enumerated or not enumerated, to ascertain and determine its existence, and to guarantee to those dealing with them the truth and conclusiveness of their admissions. In such a case, the meaning of the law granting power to issue bonds is that they may be issued not upon the existence of certain facts to be ascertained and determined whenever disputed, but upon the ascertainment and determination of their existence by the officers or body designated by law to issue the bonds upon such a contingency. * * * So, if the fact necessary to the existence of the authority

was by the law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be, that the authority to act at all depended upon the actual objective existence of the requisite fact as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow that all persons claiming under the exercise of such a power might be put to proof of the fact made a condition of its lawfulness, notwithstanding any recitals in the instrument."

III. Here we have another restriction upon the authority to recite.

In the case at bar the facts adjudicated were themselves matters "of record," and on that account no estoppel results from the recital. In other words, the evidence being "of record," the necessity for an adjudication no longer exists, and therefore the adjudication is not an estoppel.

Finally, the recital of the bond is not a recital in regard to the petition at all. The rule as modified and established in Pomplen *v.* Cooper's Union, 101 U. S., p. 204, is "when the bonds recite *the circumstances* which bring them within the power, the corporation is estopped."

IV. Supposing the recital to be valid and binding upon the signers—that is the Board of Public Works—by what process of reasoning does the

estoppel, which forbids the signer to deny the fact recited, forbid the property-holder to do so? He is neither obligor nor signer of the bond. He is not in this action disputing its *validity*. He denies only the power exercised by the Tax Collector in selling his land. Does the recital of the bond act as an estoppel in favor of its holder as against the tax-payer? Does it estop him who is neither party nor privy to the bond, in an action of ejectment, after a tax sale. No case has yet gone to this length; and the Supreme Court is now restricting rather than expanding the doctrine of estoppel by recitals.

But it will be said that if the estoppel does not run against the property-holder, it does against the signer, and in a suit on the bonds judgment will go against the obligor, which cannot be enforced.

That event has occurred before now, for in Supervisors *v.* United States, 18 Wal., 77, the Court refused a mandamus to compel the levy of a tax to pay a judgment obtained against a county. The judgment was thereby left unpaid. To the same effect is U. S. *v.* Macon, 99 U. S., 582.

As to the Report of the Board of Public Works.

By the sixth section of the Act of 1872, p. 915, the Board of Public Works was to file a "Report" of the description and cash value of the lots taken, etc., * * * and set against each lot the

amount of value or damage determined upon for the same respectively, * * * also to set opposite each lot "the sum or amount in which, according to the judgment and determination of the Board, the said lot or subdivision has been, or will be, benefitted by reason of the taking and opening of said avenue relatively to the benefits therefrom accruing to the other lots or subdivisions respectively within said district;" "such report shall be left at the office of said Board for thirty days for the free inspection of all parties, and notice that the same is open for inspection for such time and place shall be published by said Board daily for twenty days in two daily newspapers printed and published in said City and County of San Francisco."

No power is given to take proofs, to examine records, or to report in regard to the petition or the signatures thereto; and even if the Board had reported that the petition was duly signed, they could no more have "reported" than they could have "certified" themselves into existence."

By section seven, this report was to be presented, under certain circumstances, to the County Court for approval or rejection. It was presented and the Court approved it--but if there was no Board there was no report, and the judgment of the County Court could not create; it could only approve some prior existing report Nor is the judgment of the Court conclusive as to any point they had not the power to decide.

This proceeding is a "special case," whereby a statutory power not according to the course of the common law, is given only in case of the presentation of a report made by a legal Board of Public Works.

(*a*) Whatever the rule with regard to Courts of general jurisdiction while acting within the scope of their common law powers, when they act in special cases and exercise a special and statutory authority, their proceedings stand on the same footing with Courts of inferior and limited jurisdictions, and will be invalid unless the case exists in which authority to adjudicate is given.

S. F. Water Co. *v.* Alameda Water Co., 36 Cal., 639.
Smith's Leading Cases, p. 2 [832].
Matter of Beekman St., 20 John, 271-3.
Matter Mt. Morris Sq., 2 Hill., 14.
Striker *v.* Kelly, 7 Hill., pp. 15-22.
Parsons *v.* Tuol. Water Co., 5 Cal., 43.
Curran *v.* Shattuck, 24 Cal., 427.
Ricks *v.* Read, 19 Cal., 574.
State *v.* City Fond du Lac, 42 Wis., 295.

A fortiori, a statute which gives a Court a special power to confirm, alter or modify the report of another tribunal and nothing more, gives no power even by implication to hear and determine whether the tribunal making the record was

or was not legally organized and competent to make the report.

Litchfield *v.* Vernon, 41 N. Y., 136.—
29 Wis. 419.

No doubt exists as to the power of a Court of limited and inferior jurisdiction to conclusively adjudicate upon its own jurisdiction, when the examination and decision of the merits necessarily passes on the question of jurisdiction.

Brittain *v.* Kennard, 1 Brod. and Bing., 432.
4 Moore, 50.
2 Phil. Ev. [149].

But no Court of inferior and limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits and on which jurisdiction depends.

Dunbury *v.* Fuller, 9 Exch., 140.
1 Smith Ldg Cases, 1109.

When the jurisdictional point is outside of the merits, the fact so adjudged may be disproved and the procedings be avoided by parol.

Smith's Ldg. Cases, Vol. 1, part 2, 1029.
Walker *v.* Moseley, 5 Denio, 105.
People *v.* Cassel, 5 Hill, 164.

(*b*) The Act says: "The Court shall have power to approve and confirm said report or refer the same back, etc." Sec. 7, Act Ap. 1, 1872 (p. 916), Court may "order or deny an application" or petition "for an order on said Board, re-

quiring it to file with said Court the report of said Board and such other documents or data as may be pertinent thereto in the custody of said Board." Testimony may be taken as to whether the order shall be granted, and if so a copy shall be served on the Board, and it shall proceed to obey the same according to the terms of the order prescribed by the Court.

It does not appear that the Court has any power to take testimony except upon the point whether the Court shall or shall not order the report to be filed in Court. There is no provision for taking testimony even as to damages and benefits. No power to take testimony or to decide as to the genuineness of the signature to the petition or the ownership of property by signers.

(*c*) The Statute of 1872 is unconstitutional and void because it provides for a judgment of the County Court which shall affect the property of the citizen without giving him any notice.

Stuart *v.* Palmer, 74 N. Y., 183.
Searens *v.* Gerke, 2 Sawyer, 367–8.
Murray's Lessees Hoboken Ld. Co.,
18 How., U. S., 272.
Cooley on Tax, 266.

Taxation may be exercised without due process of law, but where the machinery of a court is employed to make judicial inquiry of the amount of damages and benefits; and the presumptions attached to judgments, are invoked to

sustain the proceedings taken—the machinery must be taken as it is—and it is an elementary principle that no judgment is binding, which is rendered without notice to the persons to be bound by it.

There was no due process of law, no advertisement nor notice to any one to appear and contest the report. An advertisement in two daily papers, that the report had been filed, was provided for. Even the names of the papers were not specified. Mulligan *v.* Smith, 59 Cal., 230–4.

Finally—In this case, the entire matter is one proceeding, begun in the Board of Public Works, and ending in the County Court. If the former had no jurisdiction, the latter could not have.

Any person desiring it, was entitled to the judgment of both tribunals, the Board of Public Works and the County Court. The judgment of the County Court alone, was valueless.

II.

THE ACT IS UNCONSTITUTIONAL BECAUSE IT DEPRIVED THE CITY OF THE RIGHT OF DETERMINING WHETHER THE AVENUE SHOULD BE OPENED AND FORCED IT TO LEVY THE TAX.

Taylor *v.* Palmer, 31 Cal., 252.
People *v.* Lynch, 51 Cal., 23.
Brady *v.* King, 53 Cal., 44.
Act April 26, 1863, p. 560.

PHILIP G. GALPIN,
Of Counsel for Defendant.

Dated Jan. 6, 1885.

* Since the above went to press my attention has been called to In re Grove Street, 61 Cal., 453, and Boorman v. Santa Barbara, 3, West Coast Reporter, 104, both of which are in point here.

IN THE SUPREME COURT OF THE UNITED STATES.

HENRY ZEIGLER vs. THERON R. HOPKINS,

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.

PHILIP G. GALPIN, being duly sworn, says: That he is an attorney and counselor at law, and as such, acting for J. J. Rey, the grantee of defendant herein, participated in the trial of this case in September, 1884. The deed from defendant Hopkins to Rey was made in the preceding August. On the trial it was proven that in the year 1878–9 defendant Hopkins neglected to pay the Montgomery avenue tax upon the premises; and thereupon the Tax Collector sold the same as delinquent, in March, 1879, to one S. F. Sinclair, and conveyed to him by tax deed in August, 1883, and said Sinclair, on the 7th of March, 1884, conveyed to Henry Zeigler, the plaintiff.

On the 14th day of March, 1884, the complaint herein was filed in the United States Circuit Court by Daniel Rogers, plaintiff's attorney.

Deponent further says that down to February, 1884, tax titles similar to that purchased by Zeigler were of trifling value, owing to the decision in Mulligan v. Smith, 59 Cal., 206. From the date of said decision, which had determined the invalidity of all the Montgomery Avenue taxes, the collection of said taxes was abandoned, and until 1884, the property holders within the district of assessment were able to procure loans from Savings Banks on their property, and to sell and convey the same without regard to any supposed lien or liability on account of said taxes.

At some date prior to 1884, as deponent is informed and believes, a syndicate of money-lenders, capitalists and speculators was formed to buy Montgomery Avenue bonds, then selling at a nominal price, in order to make an attempt in the Federal Courts to again levy said tax.

As deponent is informed, they purchased bonds, representing at their par value over six hundred thousand dollars, and employed Messrs. Delmas, Rhodes and Hoge, one or all of them, to set on foot the requisite legal proceedings.

The complaint of Liebman *vs.* The City and County of San Francisco, was filed in the U. S. Circuit Court by said D. M. Delmas to procure a judgment against the city on a few coupons insufficient in value to permit the judgment to be reviewed in this Court on Writ of Error. Other coupons were divided among other clients of said counsel and the following is a list of other cases brought in said United States Circuit Court with the dates of the filing of the complaints and the names of the attorneys:

No. 3,008.

CARL LIEBMAN, vs. CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS, A. L. RHODES AND J. P. HOGE. | WM. CRAIG, JOHN L. LOVE AND GARBER, THORNTON & BISHOP.

Complaint Filed May 4, 1883.

No. 3,340.

JACOB TRIEST, vs. CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. | WM. CRAIG, GARBER, THORNTON & BISHOP.

Complaint Filed June 13, 1884.

No. 3,341.

A. S. ROSENBAUM, vs. CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. | WM. CRAIG, GARBER, THORNTON & BISHOP, AND JOHN L. LOVE.

Complaint Filed June 13, 1884.

No. 3 342.

H. DEORNE, vs. CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. | WM. CRAIG, GARBER, THORNTON & BISHOP, AND JOHN L. LOVE.

Complaint Filed June 13, 1884.

No. 3,343.

CARL LIEBMAN, vs. CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. | WM. CRAIG, GARBER, THORNTON & BISHOP, AND JOHN L. LOVE.

Complaint Filed June 13, 1884.

No. 3,344.

MARK LIVINGSTON, vs. CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. | WM. CRAIG, GARBER, THORNTON & BISHOP, AND JOHN L. LOVE.

Complaint Filed June 13, 1884.

No. 3,345.

FRANK LIVINGSTON, *vs.* CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. | WM. CRAIG, GARBER, THORNTON & BISHOP.

Complaint Filed June 13, 1884.

No. 3,346.

F. W. MUSER, *vs.* CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. | WM. CRAIG, GARBER, THORNTON & BISHOP, AND JOHN L. LOVE.

Complaint Filed June 13, 1884.

No. 3,347.

SALOMON HERXHEIMER, *vs.* CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. | WM. CRAIG, GARBER, THORNTON & BISHOP, AND JOHN L. LOVE.

Complaint Filed June 13, 1884.

No. 3,348.

WILLIAM DUDEN, *vs.* CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. | WM. CRAIG, GARBER, THORNTON & BISHOP, AND JOHN L. LOVE.

Complaint Filed June 13, 1884.

No. 3,530. (Montg'y Ave. case consolidated with No. 3,347, *supra.*)

SALOMON HERXHEIMER, *vs.* CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. | JOHN L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed December 26, 1884.

No. 3,531. (Montg'y Ave. case consolidated with No. 3,344, *supra.*)

MARK LIVINGSTON, *vs.* CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. | JOHN L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed December 26, 1884.

No. 3,532. (Montg'y Ave. case consolidated with No. 3,345.)

FRANK LIVINGSTON, *vs.* CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. | JOHN L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed December 26, 1884.

No. 3,533. (Montg'y Ave. case consolidated with No. 3,343.)

CARL LIEBMAN, *vs.* CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. | JOHN L LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed December 26, 1884.

No. 3,534. (Montg'y Ave. case consolidated with No. 3,348.)

WM. DUDEN, *vs.* CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS | JOHN L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed December 26, 1884.

No. 3,535.

A. S. ROSENBAUM, *vs.* CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. | JOHN L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed December 26, 1884.

No. 3,536. (Montg'y Ave. case consolidated with No. 3,340.)

JACOB TRIEST, *vs.* CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. | JOHN L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed December 26, 1884.

No. 3,537. (Montg'y Ave. case consolidated with No. 3,346.)

F. W. MUSER, *vs.* CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. | JOHN L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed December 26, 1884.

No. 3,538. (Montg'y Ave. case consolidated with No. 3,342.)

H. DEORNE, vs. CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. — JOHN L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed December 26, 1884.

No. 3,748. (Montg'y Ave. case consolidated with No. 3,347.)

SALOMON HEIXHEIMER, vs. CITY AND COUNTY OF SAN FRANCISCO. | DELMAS, RHODES & HOGE. — JOHN L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed June 29, 1885.

No. 3,749. (Montg'y Ave. case consolidated with No. 3,344.)

MARK LIVINGSTON, vs. CITY AND COUNTY OF SAN FRANCISCO. | DELMAS, RHODES & HOGE. — JOHN L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed June 29, 1885.

No. 3,750. (Montg'y Ave. case consolidated with No. 3,345.)

FRANK LIVINGSTON, vs. CITY AND COUNTY OF SAN FRANCISCO. | DELMAS, RHODES & HOGE. — JOHN L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed June 29, 1885.

No. 3,751. (Montg'y Ave. case consolidated with No. 3,343.)

CARL LIEBMAN, vs. CITY AND COUNTY OF SAN FRANCISCO. | DELMAS, RHODES & HOGE. — JOHN L LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed June 29, 1885.

No. 3,752. (Montg'y Ave. case consolidated with No. 3,348.)

WM. DUDEN, vs. CITY AND COUNTY OF SAN FRANCISCO. | D. M. DELMAS. — JOHN L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed June 29, 1885.

No. 3,753. (Montg'y Ave. case consolidated with No. 3,341.)

A. S. ROSENBAUM, *vs.* CITY AND COUNTY OF SAN FRANCISCO. — DELMAS, RHODES & HOGE. — JOHN L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed June 29, 1885

No. 3,754. (Montg'y Ave. case consolidated with No. 3,535.)

A. S. ROSENBAUM, *vs.* CITY AND COUNTY OF SAN FRANCISCO. — D. M. DELMAS. — JOHN L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed June 29, 1885.

No. 3,755. (Montg'y Ave. case consolidated with No. 3,340.)

JACOB TRIEST, *vs.* CITY AND COUNTY OF SAN FRANCISCO — D. M. DELMAS. — JOHN L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed June 29, 1885.

No. 3,756. (Montg'y Ave. case consolidated with No. 3,346.)

F. W. MUSER, *vs.* CITY AND COUNTY OF SAN FRANCISCO. — DELMAS. RHODES & HOGE. — JOHN L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed June 29, 1885.

No. 3,757. (Montg'y Ave. case consolidated with No. 3,342.)

H. DEORNE, *vs.* CITY AND COUNTY OF SAN FRANCISCO. — DELMAS, RHODES & HOGE. — JOHN. L. LOVE, GARBER, THORNTON & BISHOP.

Complaint Filed June 29, 1885.

No. 3,763. (Montg'y Ave. case not consolidated.)

NICHOLAS LUNING, *vs.* CITY AND COUNTY OF SAN FRANCISCO. — SIDNEY V. SMITH & SON. — (No appearance.) No process issued.

Complaint Filed July 1, 1885.

No. 3,863. (Montg'y Ave. case not consolidated.)

MARK LIVINGSTON, *vs.* BOARD OF PUBLIC WORKS. } D. M. DELMAS. (No appearance.) Case dismissed.

Complaint Filed October 13, 1885.

No. 3,864. (Montg'y Ave. case not consolidated.)

MARK LIVINGSTON, *vs.* CITY AND COUNTY OF SAN FRANCISCO. } DELMAS, RHODES & HOGE. JOHN L. LOVE, GALBER, THORNTON & BISHOP.

Complaint Filed October 13, 1885.

No. 3,869. (Montg'y Ave. case not consolidated.)

A. S. ROSENBAUM, *vs.* JNO. H. BAUER, TRES., &C. } DELMAS, RHODES & HOGE. JOHN. L. LOVE.

Transferred Record Filed October 22, 1885.

No. 3,933. (Montg'y Ave. case not consolidated.)

A. S. ROSENBAUM, *vs.* BOARD OF SUPERVISORS, &C. } DELMAS, RHODES & HOGE. JOHN L. LOVE.

Transferred Record Filed December 31, 1885.

No. 3,934. (Montg'y Ave. case not consolidated.)

SALOMON HERXHEIMER, *vs.* CITY AND COUNTY OF SAN FRANCISCO } DELMAS, RHODES & HOGE. (No appearance.)

Filed Complaint December 31, 1885.

No. 3,935. (Montg'y Ave. case not consolidated.)

SALOMON HERXHEIMER, *vs.* CITY AND COUNTY OF SAN FRANCISCO. } DELMAS, RHODES & HOGE. (No appearance.)

Complaint Filed Dec. 31, 1885.

The complaint in Liebman *vs.* The City, which was first filed, looked to a judgment against the Montgomery Avenue Fund to be enforced by a mandamus directing the levy of the tax.

The tax payers within the district retained me to act for them and to intervene in their behalf in said case. The petition of tax-payers for leave to intervene in said case was filed August 1, 1884. Messrs. Delmas, Rhodes and Hoge filed an answer to the petition and op-

posed the same, and leave to intervene was denied August 18, 1884. At this time Zeigler *vs.* Hopkins, was pending in the U. S. Circuit Court, and when my application on behalf of tax-payers for leave to intervene in defense of the City in the Liebman case was denied, I advised them to buy out Hopkins, the defendant in this case, so as to secure control of the defense thereof, and guard against any neglect or abandonment of it by him either by compromise or otherwise. This advice they acted on, and Rey on their behalf bought out Hopkins, and the Committee of Property Holders took upon themselves the defense of the action.

The deed from Hopkins to Rey was dated August 19, 1884.

Mr. Gibson, who was an entire stranger to me, had been employed by Hopkins, and had filed his answer months before I came into the case; but on the sale by Hopkins, he called on me, and offered to substitute me as attorney for the purchaser. I requested him to remain in the case as attorney for Rey, promising to assist him in the trial.

On the 17th of September, 1884, Mr. Gibson and I, acting for Rey, began taking evidence, and on the 28th of November, 1884, the case was submitted. I had suggested to the Circuit Judge, that this case presented the Montgomery Avenue tax question from the tax-payers point of view, but that the cases of the bond-holders were on his docket not yet tried; and the Court in consequence, as I believe of such information deferred its decision of this case, until the other side could be presented in Liebman *vs.* The City; after Liebman *vs.* The City was decided adversely to the bondholders, the Court decided this case.

I learn from Mr. Rogers, plaintiff's attorney, that when he discovered that Rey had bought out Hopkins; that the tax-payers were behind the new defendant, he turned to the bond-holders for assistance, and requested them to furnish him aid in the trial, but they preferred for reasons which I can only conjecture, not to do so. The present motion would have been impossible had they accepted that invitation and come into the case.

For the conspicuous inaccuracies of the statement made on the motion "that they did not know of the proceedings in the lower Court until November, 1885," see the letters of Judge Rhodes written in November, 1884.

The charge in the affidavits filed, made upon information and belief, that the case was managed by the plaintiff's attorney under the direction of myself, or any of my firm, or clerks, is untrue, without excuse, and can be readily disposed of in the Court where the case was tried.

As the pendency of this litigation injuriously affects titles to a large part of the City of San Francisco, it is of public interest that a speedy conclusion be reached, and to that end after the Writ of Error was served, I agreed with Mr. Rogers, that if he would submit the case at once on printed briefs under the ninety day rule, my clients would advance the money necessary to pay for printing the Transcript. Under rule X. of this Court, I had a right to do so, and I

did pay for it, and I have not paid for printing any brief of the plaintiff.

PHILIP G. GALPIN.

Subscribed and sworn to before me this 12th day of February, 1886.

[SEAL.] FRANK TURK,
Notary Public.

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO, *ss.*

W. F. GIBSON, being duly sworn, says: That he is an attorney and counselor at law and that he was retained by defendant Hopkins to defend this action of Zeigler *vs.* Hopkins; that he had no knowledge of the foundation of plaintiff's claim until after the papers were put in his hands; that he then called upon Mr. Daniel Rogers, the plaintiff's attorney, for information; that he was informed by said Rogers that the suit was brought on a Montgomery Avenue tax deed; that deponent communicated this information to the defendant Hopkins, who up to that time was also ignorant of plaintiff's claim; that at this time deponent had not met and was not acquainted with Mr. P. G. Galpin; that subsequently in August, 1884, defendant Hopkins, sold out to Rey, and Mr. Galpin requested deponent to continue in the case. That deponent attended with Mr. Galpin at the trial, but Mr. Galpin examined and cross-examined the witnesses.

Deponent believes that plaintiff's attorney tried the case in good faith and to the best of his ability.

WILLIAM F. GIBSON.

Sworn to before me this 11th day of February, 1886.

[SEAL.] R. D. McELROY,
Notary Public.

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO, *ss.*

THERON R. HOPKINS, being duly sworn, says: That he had no knowledge of what the suit of Henry Zeigler against him in the Circuit Court was founded upon until some time after the papers were served; when he was informed by Mr. Gibson, his attorney, that he (Gibson) had called on Mr. Rogers to ascertain what was the supposed defect, in his, Hopkins' title, and said Gibson informed him that Rogers relied on a Montgomery Avenue tax deed.

Mr. Gibson continued to act in the case for me until I sold out to Rey: when Mr. Galpin called on me, he proposed to buy the lot on behalf of the tax-payers and contest the title for them.

I never heard of Henry Zeigler until the suit was brought and do not know him now.

THERON R. HOPKINS.

Sworn to before me this 12th day of February, 1886.

[SEAL.] SAM'L. S. MURFEY,
Notary Public.

(over)

STATE OF OHIO, } ss.
County of Cuyahoga, }

Wilbur G. Zeigler, being duly sworn, says that he was formerly in the employ of the firm of Doyle, Galpin & Scripture, Attorneys-at-Law, practising in the City of San Francisco, in the State of California, and acted as their Clerk: that during the years 1884 and 1885 there was no other person of the name of Zeigler in said office or connected therewith; that at no time after his employment by said firm, and down to January 2d, 1886, when this deponent left San Francisco and returned to Ohio, did this affiant have any conversations or communications with the plaintiff Henry Zeigler, or Daniel Rogers, relative to the management of the case of Zeigler vs. Hopkins, on the part of the plaintiff.

The statement in the affidavit of Gustav Sutro, filed herein, to the contrary, is untrue.

And deponent further says, that it is not true that "said Galpin, acting through deponent, procured a deed to the property in controversy, to be made to said Henry Zeigler by Samuel F. Sinclair." On the contrary, deponent never received any instructions, advice or intimations from said Galpin, or any of his firm, to procure said deed, or in regard to procuring the same, nor did deponent ever see said Sinclair in regard thereto; nor does he know from any personal knowledge of him that such a man exists; nor did deponent procure said deed to be made, or have anything whatever to do with the purchase of said premises by said plaintiff.

WILBUR G. ZEIGLER.

Subscribed and sworn to before me, this 23d day of February, 1886, at Cleveland, in the County of Cuyahoga, State of Ohio.

L. N. MYERS,

[SEAL.] *Notary Public.*

117-683

Office Supreme Court U. S.
FILED
FEB 26 1886
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1885.

No. 1240.

HENRY ZEIGLER, PLAINTIFF IN ERROR,

vs.

THERON R. HOPKINS, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Answer to Motion of A. S. ROSENBAUM.

DANIEL ROGERS,
Attorney for Plaintiff in Error.

E. F. PRESTON,
Of Counsel.

M. WEISS, PRINTER. 525 COMMERCIAL STREET, SAN FRANCISCO.

1886.

IN THE

Supreme Court of the United States

OCTOBER TERM 1885.

HENRY ZEIGLER, PLAINTIFF IN ERROR,
vs.
THERON R. HOPKINS, DEFENDANT IN ERROR.

Points for Plaintiff in Error on Motion of Rosenbaum for leave to intervene and dismiss Writ of Error.

I.

THE MOTION SHOULD BE DISMISSED ON THE MOVING PAPERS.

One who has no interest *in the premises in dispute*, is not entitled to intervene, in the Supreme Court, on a Writ of Error to review a Judgment in Ejectment. His affidavits should be struck from the files.

The interest which entitles a person to intervene, in a suit between other parties, must be in the matter in litigation, and of such a direct and immediate character that the Intervenor will either gain or lose by the direct legal operation and effect of the judgement.

Horn vs. The Volcano Water Co., Etal, 13 *California*, 62.
Porter vs. Garvissino, 51 *Cal.*, 559.
United States vs. Patterson, 15 *How.*, 10.

If interested in the points of law presentable on the Record, he may file a brief on them, as *amicus curiæ*, on leave granted.

The only exception to this rule, that can be perceived is, in cases like Wood Paper Mill Co. vs. Heft, 8 Wallace, 333, Cleveland vs. Chamberlin, 1 Black, 419, and Lord vs. Veasie, 8 How., 251, cited in the brief of the proposed Intervenor, either where there is in fact no actual *bona fide* controversy between the parties to the action, or where one party has sold out all his interest in the matter in dispute to the other party after the appeal, or where a suit has been collusively got up, in which the decision would settle no controversy between the nominal parties, but would injuriously affect the interests of third persons. This would be an abuse which Courts will not, and ought not, to permit.

But such is not this case.

See the affidavits.

II.

The Court below having found that the value of the premises exceeds six thousand dollars, and that fact appearing in the Record (Transcript fol. 10), this Court will not re-try that question on affidavits.

Youngstown Bank vs. Hewes, 106 *U. S.*, 525,
Richmond vs. City of Milwaukie, 21 *How.*, 391.
Whiteside vs. Haselton, 110 *U. S.*, 296.

In Youngstown Bank vs. Hughes, there was nothing in dispute that could be measured by a money value. But in the opinion of the Court, delivered by Chief Justice Waite, it is said:

"Affidavits can only be used to furnish evidence of "value, *not appearing on the face of the Record*, when the "nature of the matter in dispute is such as to admit of an "estimate of its value in money."

In Richmond vs. City of Milwaukie, the question was presented in the reverse order. The *Record* showed the value to be insufficient to give jurisdiction, and the appeal was dismissed for that reason. A motion was made to re-instate the case on affidavits showing the value to be in excess of the jurisdictional amount. The motion was denied, the Chief Justice saying:

"Where the value is stated in the pleadings, or "proceedings of the Court below, affidavits have never "been received to vary it, or enhance it, in order to give "jurisdiction. And the affidavit now offered could not "have been received, even if filed before the argument of "the case."

Whiteside vs. Haselton was a suit for partition. The Record *did not* show that the amount in controversy exceeded $5,000. On motion to dismiss the Appeal for want of jurisdiction, the Court received affidavits showing the value of the property to be in excess of that amount, *because the record was silent on the subject.* The Court, Mr. Justice Miller, saying:

"The motion was made in this Court to dismiss the "appeal on the ground that the amount in controversy "does not exceed $5,000. *There being no distinct statement* "*anywhere in the Record* of the value of the property in "controversy, the parties were permitted to file affidavits "here on that subject."

The cases cited in support of the proposed Intervention do not conflict with the rule as above stated.

In Dakota County Co. vs. Glidden, 113 U. S., 222, the matter in litigation was compromised after appeal to this Court. Affidavits were received to show this fact on motion to dismiss. And this, of course, because the Record was necessarily silent on that subject.

Webster vs. Buffalo Insurance Co., 110 U. S., 387, was an action on a Policy of Insurance for $4,000. This was the limit of liability and *was so alleged in the Pleadings.* It was stipulated that if judgment was rendered against

the Company for any amount it should be for $5,010. The Court held the parties concluded *by the Record*, as to the amount in dispute.

The case of Whiteside vs. Haselton, 110 U. S., is also cited by us, and referred to above.

Gage vs. Pumpelly, 108 U. S., 164, was an action to set aside a tax sale. The amount of the taxes and costs of suit were $1,120.79. There is nothing in the case, as reported, which shows, that the value of the premises sold for the tax, appeared in the Record, and we assume, that for that reason affidavits with respects to the value were permitted to be read.

III.

The affidavits show, that the decision will affect property of the value of over one million dollars.

DANIEL ROGERS,
Attorney for Plaintiff in Error.

E. F. PRESTON,
Of Counsel.

HENRY ZEIGLER, Plaintiff in Error,
vs.
THERON R. HOPKINS, Defendant in Error.

STATE OF CALIFORNIA.
City and County of San Francisco, } ss.

DANIEL ROGERS being first duly sworn, deposes and says: that he, as the Attorney of the Plaintiff in Error, brought this action in the U. S. Circuit Court for the District of California, on the 14th day of March, 1884, that the said action was an action of ejectment brought upon a tax-deed, issued under the provisions of an Act of the Legislature of California, entitled "An Act to open and establish a public street in the City and County of

San Francisco, to be called Montgomery Avenue, and to take private land therefor." Approved April 1, 1872.

The principal question involved was the validity of the petition required by the fifth section of said Act.

That the trial commenced September 17th, 1884. This deponent believing that the questions involved in this action had some bearing on several cases then pending in the said Court, commonly designated as the "Montgomery Avenue Bond Cases," and desiring that the Counsel engaged in these cases should take part in the present action, did call at the office of Judge Rhodes on the 18th day of September, 1884, but found the Judge absent, but his partner, Mr. Barstow, was in; this deponent requested Mr. Barstow to inform Judge Rhodes that testimony in the case of Zeigler vs. Hopkins in the U. S. Circuit Court, was then being taken, that September 19th, 1884, was appointed for the further taking of testimony, that if Judge Rhodes desired to appear and introduce testimony I would be pleased to have him do so. In the afternoon of the same day I again called at the office of Rhodes & Barstow, and saw Mr. Barstow, who informed me, that he had communicated my message and request. Mr. Barstow informed this deponent, that Judge Rhodes had consulted his associate Counsel, Mr. Delmas, and that he (Barstow) thought, that they would decline to appear with me in the case, or to unite with me in taking testimony.

After the testimony had been taken, this deponent addressed to Judge Rhodes the following letter :

San Francisco, November 20th, 1884.

JUDGE RHODES,

Dear Sir :

I am informed you represent parties who are interested in the cases involving the validity of the Montgomery Avenue Bonds, and I desire to solicit your interest in a

case now pending in the U. S. Circuit Court which may indirectly affect that question.

In the case of Henry Zeigler vs. T. R. Hopkins, No. 3,259, which is an action of ejectment on a deed of the Tax Collector on a sale of property for delinquent taxes assessed to pay interests on the bonds.

Mr. Houghton, to whom was referred the taking of testimony, has made a report in detail of the number and character of the persons signing the petition for the openings of Montgomery Avenue showing that a majority did not sign. It may be necessary to file exceptions to the report.

The case may be called for trial in Court the early part of next week.

My object in giving you this information is, that, if you think the case has any bearing on the "Equity Case," involving the validity of the bonds, you might examine the report of the Referee and file exceptions to it, or if you thought proper—which I would very much desire—to take part in the trial of the case.

I would be glad to be informed of your determination in this matter.

Respectfully yours,

DANIEL ROGERS,

604 Merchant Street.

On the 22nd day of November, 1884, this deponent received the following letter in reply:

San Francisco, November 21st, 1884.

DANIEL ROGERS, Esq.

Dear Sir:

Many thanks for your courteous offer to me, respecting the action of Zeigler vs. Hopkins in the U. S. Circuit Court.

I saw the order of reference to Mr. Houghton to take the testimony. And as the order directs him to take

testimony and report the frontage of the lots, in the District, on the Assessment Roll, etc., and as one of our principal positions is, that those questions are *not* open to inquiry—that evidence is not admissible for that purpose, I do not see how I could aid you, or rather how I could in that case present propositions, on which we rely in our cases—the Liebman cases.

I will present your letter to my associates, and after consultation with them give you a definite answer to your courteous invitation.

Respectfully yours,

A. L. RHODES.

At or about the time of the argument of the case of Liebman vs. San Francisco—involving the Montgomery bond question, Judge Rhodes called at the office of this deponent and presented him with a copy of his brief in the above entitled case, and on that occasion said to this deponent, that the reason he had not appeared with this deponent on the trial and argument of this case was, that he thought that the stipulation made in the case was too liberal, or words to that effect, but that he had since examined it, and ascertained, that he was mistaken, and that he now regretted he had not appeared in the trial and argument of the case. By the moving papers, page 5, it appears that Judge A. L. Rhodes is one of the Counsel of Rosenbaum, the petitioner here.

This deponent further says, that, after the Writ of Error had been issued in this action, he addressed to Judge Rhodes the following letter:

San Francisco, November 25th, 1885.

JUDGE RHODES,

Dear Sir:

A Writ of Error from the U. S. Supreme Court has been issued in the case of Zeigler vs. Hopkins, lately

case now pending in the U. S. Circuit Court which may indirectly affect that question.

In the case of Henry Zeigler vs. T. R. Hopkins, No. 3,259, which is an action of ejectment on a deed of the Tax Collector on a sale of property for delinquent taxes assessed to pay interests on the bonds.

Mr. Houghton, to whom was referred the taking of testimony, has made a report in detail of the number and character of the persons signing the petition for the openings of Montgomery Avenue showing that a majority did not sign. It may be necessary to file exceptions to the report.

The case may be called for trial in Court the early part of next week.

My object in giving you this information is, that, if you think the case has any bearing on the "Equity Case," involving the validity of the bonds, you might examine the report of the Referee and file exceptions to it, or if you thought proper—which I would very much desire—to take part in the trial of the case.

I would be glad to be informed of your determination in this matter.

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I saw the order of reference to Mr. Houghton to take the testimony. And as the order directs him to take

testimony and report the frontage of the lots, in the District, on the Assessment Roll, etc., and as one of our principal positions is, that those questions are *not* open to inquiry—that evidence is not admissible for that purpose, I do not see how I could aid you, or rather how I could in that case present propositions, on which we rely in our cases—the Liebman cases.

I will present your letter to my associates, and after consultation with them give you a definite answer to your courteous invitation.

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A. L. RHODES.

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This deponent further says, that, after the Writ of Error had been issued in this action, he addressed to Judge Rhodes the following letter:

San Francisco, November 25th, 1885.

JUDGE RHODES,

Dear Sir:

A Writ of Error from the U. S. Supreme Court has been issued in the case of Zeigler vs. Hopkins, lately

decided by the U. S. Circuit Court in favor of the defendant.

I have agreed with Counsel for the Defendant in Error to submit the case on printed arguments so that a speedy determination may be had.

If you desire to take part in this case, I would be pleased to have you submit a printed argument, or if you decline so to do, I will, with your permission, incorporate all your argument under point VII, of your brief in Liebman vs. San Francisco in the U. S. Circuit Court.

I enclose a copy of the assignment of errors which I propose to annex to the record. Any suggestion you may make I will cheerfully adopt.

Hoping to hear from you at your earliest convenience, and requesting an early return of the "Assignment of Errors,"

I remain,

Respectfully yours,

DANIEL ROGERS,
604 Merchant Street.

And on the 28th day of November, 1885, he received the following reply:

San Francisco, November 28th, 1885.

DANIEL ROGERS, Esq.

Dear Sir:

Thanks for the copy of Assignment of Errors in Zeigler vs. Hopkins. I am obliged to you also for your courteous offer to permit me to file a brief in the Supreme Court of the United States on behalf of the Plaintiff in said cause. I understand that no Bill of Exceptions was filed. You are aware, I think, that one of the principal points, upon which we rely in the litigation for the recovery upon the bond is, that no evidence is admissible *aliunde*, the certificate of the Mayor and the records of

the Board of Public Works, and the judgment of the County Court to prove the sufficiency or the insufficiency of the petition. As I understand, the stipulation between the parties to this case parol evidence was admitted *by consent* of the parties, upon that issue. I must therefore decline, with thanks, to file a brief in the case.

You are at liberty to avail yourself of the points, authorities and arguments which I presented to the Circuit Court in the Liebman case.

Upon the receipt of your letter, accompanying the Assignment of Errors, I was so busy in the preparation of a brief to be forwarded to Washington, and in getting ready for an argument before the Supreme Court Commissioners, that I had no time until this morning to answer you, and I hope the delay has caused no inconvenience to you.

Yours truly,

A. L. RHODES.

This deponent further says that he has seen a copy of an affidavit made by one Gustave Sutro, on motion to dismiss this case, which this deponent pronounces untrue in every part thereof, and maliciously false.

This deponent further states that he never knew nor saw the said Gustave Sutro, prior to the 18th day of November, 1885, that on that day the said Sutro, who was in the office of James Wheeler, Esq., which was the adjoining room to this deponent--was introduced to this deponent by the said James Wheeler. That this deponent never had any conversation with the said Sutro except in the presence of the said James Wheeler, Esq., except on an occasion when the said Sutro called at this deponent's office, and enquired whether this deponent would give the entire control of this case in the U. S. Supreme Court to the Attorneys of the bond holders, or whether he (Sutro)

could purchase the tax-deed upon which this action was based.

That this was the only conversation on the part of the said Sutro, and a simple negative answer was the only conversation on part of this deponent.

That in none of the conversations between the said Sutro and this deponent was there any reference to any of the matters contained in the said affidavit of said Sutro.

And this deponent further says that prior to the 18th day of November, 1885, the day when this deponent saw the said Sutro for the first time, never having known or met him before—the proceeding in relation to the Writ of Error had been taken—that is, on Saturday, November 14th, 1885, the precept for the Writ had been given and filed, and the cost paid by this deponent.

This deponent further says that this cause was not intrusted to him or put into his hands by "Mr. Zeigler"—whose name he has since been informed to be W. G. Zeigler — nor any one connected in business with Defendant's Counsel, nor did deponent ever receive any directions from the said W. G. Zeigler, who was a clerk in the office of Mr. Galpin—that he never knew that there was a "Mr. Zeigler" in the office of Mr. Galpin until within the last few days.

And this deponent further says that in the management or in any of the proceedings of this cause, he was neither controled, directed, instructed, nor advised either by Mr. Galpin or by any one in his employ, or in or about his office.

And this deponent further says, that the relations of Philip G. Galpin, and this deponent in this action, have been throughout simply those of opposing Counsel, but conducted with harmony, and with a strict observance of professional etiquette.

That the reputation and legal abilities of the said Philip G. Galpin are such as to preclude the idea of being

engaged in a Collusive Action, and this deponent believes that he has presented such cogent facts as to relieve him of such charge.

And this deponent further says on his information and belief, that the property within the District of Assessment is of the value of over two million dollars, and the lien thereon of the Montgomery Avenue Bonds is over one million and one half dollars.

Deponent insists that Defendant is bound by the findings of facts on the question of value of the premises, and that, as Defendant is bound, the intervenor, who has no interest in the premises in question, is in no better position to attack the Writ of Error.

DANIEL ROGERS.

Subscribed and sworn to this 11th day of February, A. D. 1886, before me

[SEAL.] EUGENE W. LEVY,
Notary Public.

STATE OF CALIFORNIA.
City and County of San Francisco. } ss.

GEORGE W. GRANNISS, CHARLES KOHLER, JAMES R. BOLTON, ALPHENS BULL, GEORGE A. WORN AND CHARLES ASHTON being severally sworn, each for himself severally says, that he has been a resident of the City and County of San Francisco for 10 years last past, and has been dealing in Real Estate therein for that period of time, that he is familiar with the values of Real Estete therein, and that the value of the property within the Montgomery Avenue District of Assessment, as defined in an Act of the Legislature of the State of California, approved April 1st, 1872, and entitled "An Act to open and establish a public street in the City and County of San Francisco, to be called Montgomery Avenue, and to take private lands

therefor," is over two millions of dollars, and that the lien thereon for payment of the so called Montgomery Avenue Bonds is over one million and a half dollars, and that the decision of this case will necessarily affect the value of said Real Estate to the extent of said lien.

GEO. W. GRANNISS,
CHAS. KOHLER,
JAMES R. BOLTON,
STEPHENS BULL,
GEO. A. WORN,
CHAS. ASHTON.

Subscribed and sworn to before me this 9th day of February, 1886.

[SEAL.] CHAS. T. STANLEY,
Notary Public.

STATE OF CALIFORNIA.
City and County of San Francisco. } ss.

JAMES WHEELER being duly sworn says: that he is an Attorney and Counsellor at Law, residing in the City and County of San Francisco, State of California; that he has read a copy of the affidavit made by Gustav Sutro in the above entitled cause, dated December 4th, 1885:

That about the 1st day of June, 1885, a holder of a number of the Montgomery Avenue bonds spoke to this deponent in regard to the litigation pending in regard to the same, and thereupon this deponent told him of the existence of this action, and suggested to him that his counsel Messrs. Rhodes, Hoge and Delmas should inform themselves concerning it, whereon said bond holder requested deponent to confer with said Gustav Sutro in regard to the same, which deponent did, and urged said Sutro to inform the counsel of the bond holders of the

same that they might, if they thought proper take action in regard to it.

About the same time this deponent heard street rumors to the effect as stated in said affidavit of M. Lewis, that this action of Zeigler vs. Hopkins was a collusive action, and knowing said Daniel Rogers informed him of them, at which said Rogers expressed much surprise and indignation, saying that he had been employed by the plaintiff to bring said action and to obtain a speedy decision thereon, and thereon said Rogers as in his affidavit stated, urged the counsel of said bond holders to aid him in the presecution of such action.

That afterwards said Sutro requested deponent to introduce him to said Rogers, which deponent did sometime in the month of November, 1885.

Deponent was present at two interviews, between said Rogers and said Sutro, at which no such matter was stated by Rogers as is claimed by said Sutro in his affidavit, such a statement on the part of said Rogers would have most certainly attracted deponent's attention as being contradictory to his previous statements, but also to the action which he had taken :

That said Sutro and said Rogers had an interview on November 18th, 1885, at which deponent, was not present, and further deponent says not.

JAMES WHEELER.

Subscribed and sworn to this Eleventh day of February, A. D. 1886, before me

[SEAL.] EUGENE W. LEVY,
Notary Public.

MAR 5
JAMES H. McKENNEY
CLERK

117-683

IN THE

Supreme Court of the United States

OCTOBER TERM 1885.

No. 1240.

HENRY ZEIGLER, Plaintiff in Error,

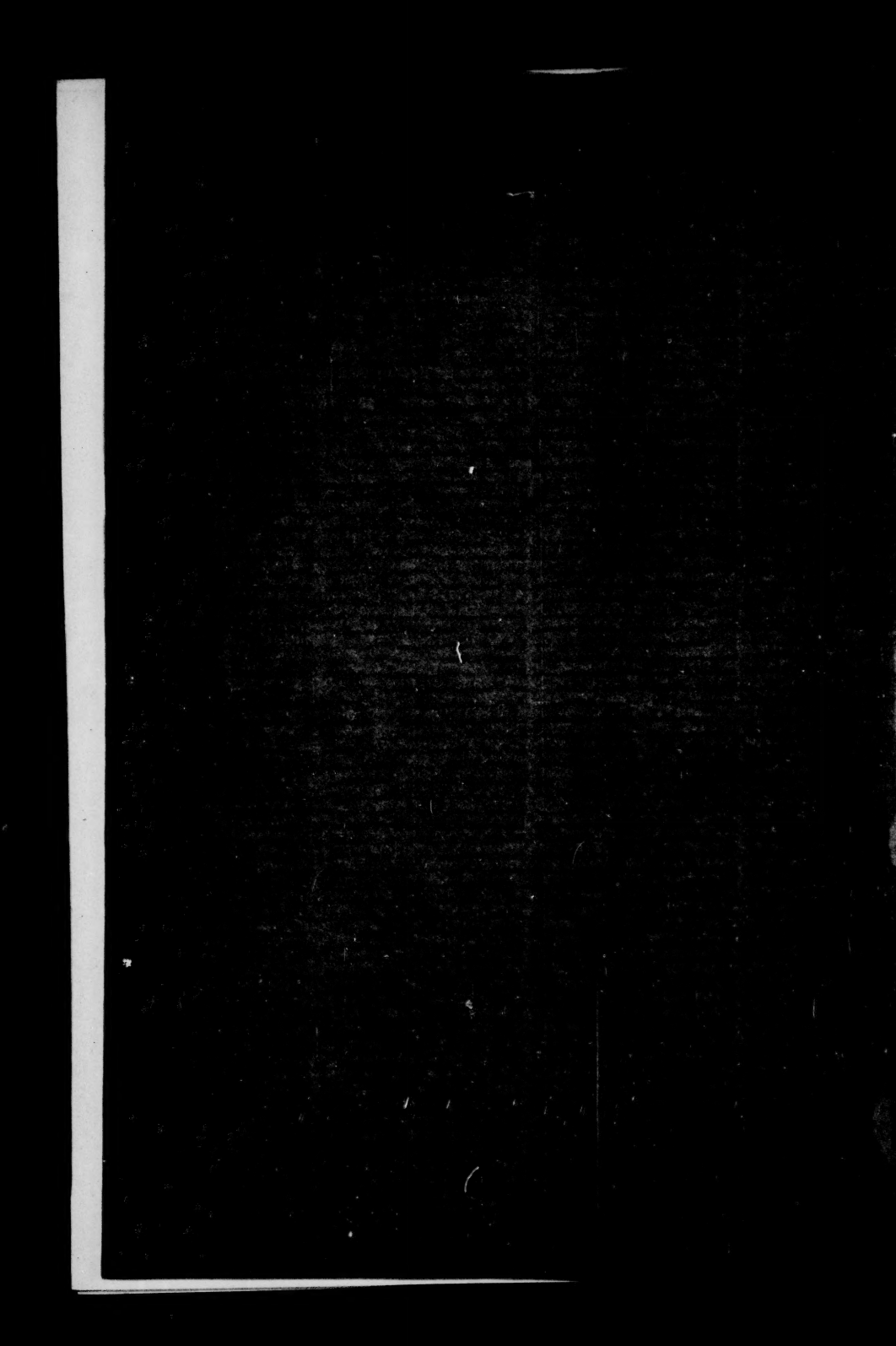
vs.

THERON R. HOPKINS, Defendant in Error.

RESPONSE OF ALBERT S. ROSENBAUM TO THE ANSWER AND REPLY FILED IN THIS CASE TO HIS MOTION TO DISMISS THE SAME.

D. M. DELMAS,
A. H. GARLAND,
Attorneys for Rosenbaum.

THOMAS MCGILL & CO., Law Printers, Washington, D.C.



IN THE

Supreme Court of the United States.

October Term 1885.

HENRY ZEIGLER, Plaintiff in Error,
vs.
THERON R. HOPKINS, Defendant in Error. } No. 1240.

Response of Albert S. Rosenbaum to the Answer and Reply filed in this case to his motion to dismiss the same.

Comes said Rosenbaum, and first asks leave to amend the motion to dismiss filed by him, by filling blanks therein as follows: On page 13, paragraph XIV, after the word *follows*, line four, insert 212, 213, 214, 216, 217, 218, 219, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1008, 1233, 1234, 1235, and 1520; and on page 16, to perfect the affidavit therein, insert as follows:

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss.*

Joseph Brandenstein, being first duly sworn, doth depose and say that he is the agent of the above-named plaintiff, *Albert S. Rosenbaum*, in the State of California; that said plaintiff is absent from said State; that the facts stated in the foregoing complaint are within the knowledge of affiant, and therefore he makes this verification; that the foregoing complaint is true, of affiant's own knowledge.

J. BRANDENSTEIN.

Subscribed and sworn to before me this 12th day of October, 1885.

[*Seal.*] *LEE D. CRAIG,*
Notary Public.

These two items were omitted from the motion, as the papers from which it was prepared were not perfect, and the facts were not then within reach of counsel.

The fact stated by Mr. Galpin, page 7–8 of the *reply*, as to the purchasing out Hopkins by the tax-payers in the litigation, is quite sufficient to establish the collusion in the suit, and to show there is no real controversy between the parties, precisely as averred in the motion to dismiss. And the stubborn fact remains, established by record, proof and oral testimony, that the value of the property at its best days never reached one-fifth of the amount necessary to give jurisdiction to this court.

Aside from these matters of fact brought here by affidavits in support of the motion, the *reply* of the parties shows a large number of persons, not parties to this case, are to be affected by the result of this *suit*, and several millions of dollars depend upon it, and yet this is a collateral issue based on a tax-title for a piece of ground worth six hundred dollars. This is a suspicious circumstance, that should cause the court to hesitate long before it permits this case to progress to final hearing and decision here.

But there are facts and circumstances attending this case in the court below, and here as well, that unmistakably stamp it as a *collusive or made-up* proceeding.

The record with the briefs on both sides came here just in time to save submission at this term under the 20th rule, and they came in together on their long journey from California more as friends and allies than as combatants—and millions depend on the decision of the case.

Turn over to the record. It is evident the defendant in error made this record to suit himself, or if not, some one not unfriendly to him did. There is not a solitary ex-

ception saved upon which to invoke a decision by this court. The court below ~~tried~~ found the facts and the law, and no point is saved or presented for this court to pass upon. The construction of section 700, Revised Statutes, so often given by this court, renders it too plain that there is nothing here for this court to consider, and therefore, upon the face of the record, an affirmance follows, and this is what all parties on the record in this pretended suit want. (See note to Section 700, Revised Statutes, (p. 131), for most of the cases where this court has passed on this question as here suggested, and see Martinton *v.* Fairbanks, 112 U. S., 672 *et seq.*)

Again, look at page 13, Transcript, where (eighth) it is agreed that either party may read from records in two cases in the California State Courts, and yet it does not appear that anything was read from them, nor are we given to understand where they are to be found. And then, take this whole agreement of counsel, (pp. 12, 13, Transcript,) and is it not the most amicable and polite yielding by counsel that was ever seen in a *real contest* in court, and upon which millions are depending?

The facts show here beyond all doubt, and the circumstances surrounding this case make it more of a comedy than an actual contention between parties in adverse interest.

The court must not confuse this motion to dismiss with a motion to intervene. No intervention is asked, but a dismissal is asked by a person who, it is admitted by the parties themselves, will be affected by the decision in this case, though he is not interested in the property supposed to be in litigation here—just precisely as stood Moore in *Lord* v. *Veazie*, 8 *How.*, 251, when he moved to dismiss that case. His motion was sustained, and for the same reasons Rosenbaum's should be. This case (8 How., *supra*) settles this motion, and the cases of later date referred to in the motion here sustain that ruling, and have empha-

sized it in many respects; and with those cases it is not possible to reconcile the holding of this case on the docket for decision.

But should the court feel that it is not clear the case should be dismissed, we must ask a reservation be made in the decision of it, that it shall settle no question as between parties contending in litigation for the payment of the *Montgomery Avenue bonds*. Because, as we have seen, if this case stood here without any motion to dismiss, an affirmance would follow *pro forma*, as it were, there being nothing presented for this court to pass upon. Rosenbaum and others holding these bonds do not wish to be parties to this suit, for they already have their litigation direct, and in it all proper questions are fully presented. So that if the court find the motion to dismiss not well taken, we submit it is but just and proper to limit an affirmance to and upon the real ground of practice, and not permit it to reach out and affect interests of such value of so many people, who are shown by the papers of the parties to this record filed here to be concerned in the questions that are alleged to be involved in this fictitious and unreal contest.

Respectfully,

D. M. DELMAS and
A. H. GARLAND,
For Rosenbaum.

Office Supreme Court U. S.
FILED
MAR 3 1886
JAMES H. McKENNEY,
CLERK.

117-682

IN THE

Supreme Court of the United States.

HENRY ZEIGLER
vs.
THERON R. HOPKINS. } No. 1240.

On Motion to Dismiss.

Reply by the Plaintiff in Error to the Second Brief in Support of the Motion.

We deem the following statement of facts to be pertinent in reply to the response which has been filed on behalf of Mr. Rosenbaum.

1. By an act of the Legislature of the State of California, approved April 1, 1872, provision was made for opening a street known as Montgomery avenue, (R., p. 7) and provision was made, in such act, for the issuance of bonds and for assessing the property along said avenue for the purpose of satisfying said bonds.

2. In 1879 the premises now in controversy were sold by the tax-collector, for the non-payment of taxes assessed under said act, to Samuel F. Sinclair, (R., p. 8), and a deed conveying the same to said Sinclair was executed by the said collector.

3. These premises were sold and conveyed by the said Sinclair to the plaintiff in this suit, (R., p. 8.)

4. It appears by the affidavit of Philip G. Galpin, Esq., that the Supreme Court of California had decided that these bonds were invalid; and, after that decision, the property was considered not subject to any assessment for taxes on account thereof; and that, by reason of this, these bonds had come to be of merely nominal value; and in this condition they were purchased by speculators to the amount of over six hundred thousand dollars of their par value.

5. That these speculators brought suits, in the Circuit Court of the United States, on the coupons of these bonds, but brought the suits in such amounts that no jurisdiction could be had in this court for the review of any judgment that might be rendered in such cases. These suits were brought at periods ranging from the 4th of May, 1883, to the 31st of December, 1885. (See affidavit of Mr. Galpin.)

6. The action now pending in this court, in which this motion is made, was commenced on the 15th of March, 1884.

7. On the 1st of August, 1884, the tax-payers petitioned to intervene, in one of the cases, on the coupons, in the Circuit Court of the United States, which petition was denied on the 18th of August, 1884.

8. Thereupon, on the 19th of August, 1884, the tax-payers bought out Hopkins, the defendant in the now pending case, and Hopkins, on that day, conveyed to Mr. Reay the property in controversy for the purpose of enabling them, the tax-payers, to defend the case.

9. The prosecution and defense of the case then proceeded, and testimony was taken before a referee or commissioner.

10. Mr. Gibson, who was defending the case for Hopkins, before the sale by the latter, continued in the defense of the case, and there was associated with him Philip G. Galpin, Esq., who represented the tax-payers in respect of this controversy. Mr. Rogers, who brought the suit for the plaintiff, continued to represent him in the prosecution of the case.

11. While the testimony was being taken, Mr. Rogers, on the 20th of November, 1884, invited Judge Rhodes, who represented these bondholders in the cases pending in the Circuit Court on the coupons, to take part in the prosecution of the case, as will fully appear by the letter of Mr. Rogers set forth in his answer to the motion of Rosenbaum, (p. 5,) and he likewise brought the attention of Mr. Barstow, who was the partner of Judge Rhodes, to the case, and requested him to inform Judge Rhodes that testimony was being taken, and expressed his desire that Judge Rhodes should appear and introduce testimony if he desired so to do. (See Rogers' answer, p. 5.) After a writ of error had been taken to this court, to wit, on the 25th of November, 1885, Mr. Rogers invited Judge Rhodes to submit a printed argument to this court, and in the event he did not elect so to do, asked his permission to incorporate in his, Rogers' brief, a portion of the brief of the said Rhodes that had been filed in the case of the bondholders above alluded to. (See Rogers' answer, pp. 7 and 8.)

12. These invitations, on the part of the attorney of the plaintiff in error in this case, to the counsel for the bondholders were declined, as will appear by reference to the correspondence on pages 8 and 9 of the answer of Mr. Rogers.

13. The cases of the bondholders above alluded to were on the docket and untried, and on the suggestion of Mr. Galpin, made to the Circuit Court, that the bondholders' cases were pending and undisposed of, the decision of the court in this case was deferred until the bondholders' cases were decided. They were decided adversely to the bondholders by Mr. Justice Field and Judge Sawyer, and after that decision the present case was decided by Judge Sawyer, following the decision in the bondholders' case.

14. It thus appears that before any of the bondholders' cases had been commenced, this property had been sold at tax sale and conveyed to Sinclair, and Sinclair had sold it to the plaintiff. The interests of the bondholders and the interests of the plaintiff were in the same direction, because unless the validity of the assessments, and the proceedings of the officials in issuing the bonds, in making the assessment and sale, &c., &c., could be maintained the bondholders had no valid claim, so far, at least, as the validity of the sale depended upon the validity of the bonds. That the bondholders were invited to take part in the prosecution of this case, and for the very reason that their interests, and the interests of the plaintiff, were in these respects substantially identical.

The taxpayers were interested in defeating the pending action of the bondholders. They sought to intervene in those actions, but failing in that they turned to this case and took a conveyance of the property in question, from the defendant, Hopkins, and took upon themselves the burden of that defense, and thus they had an opportunity to see to it that the proper defense was made. Thus was brought into this litigation a party whose interest is quite in accord with that of the bondholders on one side; and, on the other side, virtually are the tax-payers, whose interests are virtually the same as those of the actual defendant in the action.

It is said, in the response filed by Mr. Delmas and Mr. Garland (p. 2), that the purchasing out of Hopkins, by the tax-payers, is quite sufficient to establish the collusion, and to show that there is no real controversy between the parties.

We respectfully submit that the facts above stated, all of which appear in the affidavits, &c., referred to, show precisely the reverse of this. They show clearly that there is a *real* controversy between the plaintiff and defendant who represents the taxpayers, and we are unable to see how the fact of the taxpayers making this purchase, under the circumstances, can be made to establish, or even indicate, any collusion. On the contrary, all the facts in the case show quite the opposite, and they especially show extreme vigilance on the part of the plaintiff to secure the co-operation of the bondholders in the prosecution of the case, and extreme vigilance on the part of the tax-payers in the defense of the case, this latter because the tax-payers were unwilling to risk the defense of the case in the hands of Hopkins, and therefore purchased his interest, to the end that they might insure the making of the proper defense, according to their own views.

We fail to see any indication of collusion in the fact that the briefs came *together* from California, even if that were a fact. If these attorneys in California agreed to submit their case under the 20th rule, as they did, no inference can be drawn against them from the fact that they forwarded their briefs at the same time, if they did do so. It would be quite natural and strictly proper that such should be the case, inasmuch as the case was to be submitted on briefs.

The further point is made, as indicating this collusion, as follows:

"It is evident that defendant in error made this record to suit himself, or, if not, some one not unfriendly to him did."

The evidence of this assertion is not produced. What seems to be relied upon in support of it is that "there is not a solitary exception saved upon which to invoke a decision by the court." Whereas in point of fact, the record shows (pp. 7 to 11 inclusive) that the court *specifically*, and in detail, found all the facts necessary to enable this court to pass upon the questions as to whether or not the bonds that were issued were issued in accordance with the act of the Legislature of California above referred to.

Those findings of fact are in strict accordance with the requirements of section 700 of the Revised Statutes, in so far as that section contemplates and provides for special findings of fact, where the case is submitted to the court without the intervention of a jury. In other words, the findings as found in the record (pp. 7 to 11) are "special," and evidently designed to be so full and complete as to satisfy the law in regard to what constitutes a special finding of facts. They are so full and complete as to raise and present all the essential questions of law which enter into the judgment, and are such that an inspection of such facts, so specially found, clearly presents to this reviewing court the questions of law which are determinative, and conclusive, of the case, and of the lawfulness of the judgment reached.

It will be observed that, throughout this entire proceeding, there is not an intimation that the facts, with the exception of No. 2, are otherwise than as found by the court. These parties, who are seeking to dismiss this proceeding, have not anywhere claimed, so far as their papers show, that the facts with said one exception are different from what have been found by the court in its special findings. So, also, it nowhere appears, either in the record or in the affidavits, that, during the trial or in the presentation of the evidence, any rulings were made by the court which could with propriety be excepted to. So, also, it does not appear that any question could be fairly made, either on a motion for a new trial or otherwise in regard to the suffi-

ciency of the evidence to sustain the facts found. So, also, it appears, by the face of the findings of facts by the court, that there is no repugnancy between the various facts found, no commingling of findings of law and fact, and no other defect which could, with propriety, be made the predicate of motions for new trial, in arrest of judgment, or otherwise. The motion to dismiss asks this court to *presume* that all, or *some* of these defects, in the trial did, in fact, appear, and ought to have been presented in *some* way as exceptions to the proceeding in the court below. This seems to us to be quite preposterous. The courts never "*presume*" errors.

This, we submit, disposes of another point which is made on page 4 of the response, in these words:

"Because, as we have seen, if this case stood here without any motion to dismiss, an affirmance would follow *pro forma*, as it were, there being nothing presented for this court to pass upon."

An affirmance, we insist, would *not* follow *pro forma*, and for the obvious reason that the court has here, as above stated, specifically found, in detail, all the facts that are necessary to enable this court to determine whether or not these bonds were lawfully issued, and whether or not this sale was lawfully made, and whether or not, therefore, this judgment can be sustained as a conclusion of law arising upon the facts found.

The following authorities will show the conditions under which this court will review the judgment of the court below, and affirm or reverse that judgment accordingly as the special findings of fact, presented upon appeal or writ of error, shall require:

Sun Mutual Ins. Co. *v.* Ocean Ins. Co. (107 U. S. 500), and cases there cited, and the cases cited in Barnes *v.* Sanborn, 10 Nevada, 248.

O'Reilly *v.* Campbell, et al., decided at the present term of this court.

The next point, in this responsé, to which we desire to invite attention is that it is claimed that, by the affidavits filed, it has been established that the property is not of a value sufficient to bring it within the jurisdiction of this court; and in reply to this we refer to the second finding of fact, where it will be seen that the court distinctly found that the premises in dispute, exclusive of costs, exceeded and do exceed the value of $6,000. This fact thus found by the court, we submit, cannot be disputed by affidavits; and on this subject we refer to the authorities collected in the brief of Mr. Rogers, on this motion, at pages 2, 3 and 4.

These authorities apply to the matter of attempting to contradict, by affidavit, a finding in regard to the jurisdictional fact of value. But it is equally true that this court will not re-try *any* questions of fact specially found, and which are in the nature of a special verdict. See the authorities in the case of

The Abbotsford, 98 U. S., 404.
Sun Mutual Ins. Co. *v* Ocean Ins. Co., 107 U. S., 500, and the cases there cited.

We wish, now, to especially, and with care call the attention of the court to this controlling fact, in this case, bearing upon the alleged collusion.

In order to make out the collusion, so far as that charge goes to the integrity of the *finding by the court* it is indispensable that the movers should show that the *court* was in the alleged corrupt confederacy. This is so, because—

First. It appears by the record and the affidavits that the testimonny was taken in the usual way by adversary examinations and cross-examinations. The judgment and decree of the court *show* that that testimony was submitted to the court. It shows that the court not only considered it, but that it was *taken under advisement*, for the purpose of careful consideration. The records and affidavits further

show that the unusual precaution was taken of *deferring* the judgment until after another case, involving some of the same questions, should be determined by one of the justices of this court along with Judge Sawyer. It appears that the findings of fact were only reached upon, and after, all these precautions, and this solicitude in the court in the direction of attaining just results.

It must also be observed that the authors of this motion to dismiss were invoked, at due times and repeatedly, to come in and see that the testimony, so taken and submitted, was full and ample. If, therefore, this judgment of the court is the result of collusion or corruption, the court itself must have been involved in it, in its failing to render a just finding of facts upon the testimony so taken.

To this statement, in regard to the findings of fact by the court, there is the exception that it appears by the record that the second finding of fact, in regard to the value, was reached, by the court, under an agreement, or stipulation, by opposite counsel. But it nowhere appears that there was not other evidence on that subject.

In the absence of anything in this record to show that there was not other testimony touching the subject of value, and it appearing, by the record, that evidence was submitted to the court in this trial, it cannot be *presumed*, by this court, that the submission, so far as this feature of the case is concerned, was *exclusively* upon that stipulation made between the parties. And the court, having found the value as a fact, we repeat, on the authority of the cases above cited, that the question is not one that can now be disputed though *ex-parte* affidavits. The record, on that question, is conclusive.

The case of Lord *v.* Veazie, (8 How., 254,) cited in the "response," does not sustain the position of the parties moving to dismiss this case. In that case there was "no *real* dispute" as the court is careful to say, between the plaintiff and the defendant. In this case there is a real

dispute between the plaintiff and the defendant, as the facts above set forth show. In that case the party who made the motion to dismiss had no knowledge of the pendency of the suit in the Circuit Court, and no opportunity of being heard there in the defense of their rights, so expressly says this court. In this case they *did* know of the pendency of the suit in the Circuit Court; and they were *invited*, as above shown, to appear and defend their rights, but declined to do so. The same remark which we make in regard to this case of Veazie applies to the succeeding cases (cited by counsel in support of the motion) which were determined by this court. They are all cases where there was *no real adversary interest* existing between the nominal parties at the time the jurisdiction of this court was invoked.

We are solicitous in respect of this motion, not only because of the case itself, but also of its imputation against the integrity and honor of the counsel for plaintiff and defendant, who are *alike* assailed by this motion, and who conducted this proceeding in the Circuit Court. By this motion it is alleged that these attorneys were acting in collusion with each other and seeking to perpetrate a fraud on this court. And while, for the purposes of the trial below, they stood in antagonism to each other, each seeking to maintain, as it was his duty to do, the rights of his client; and each, in this court, by the briefs that they had filed, showing that they are earnestly and zealously maintaining these respective interests, and in antagonism to each other, yet, by this motion, it is sought to show that this is only a *simulated* antagonism, and that, in point of fact, they are acting together with a common purpose to deceive this court. This accusation against them is brought by one who it is alleged had become a purchaser of bonds that had become merely nominal in value, and was engaged in the prosecution of a suit in such a way as to deprive his adversary of the right to have the questions involved passed

upon by this court,—this by purposely dividing up the coupons in such a way as that the amount sued on should be less than the sum required in order to allow a review in this court.

This most conspicuous fact in this case is nowhere denied. It is directly asserted by Mr. Galpin in his affidavit. We submit that the accuser does not come into this court with clean hands, nor under circumstances which entitle him to its favorable consideration, and especially since a favorable determination of his motion convicts attorneys whom we are assured are men of high personal and professional character of engaging in an attempt to commit against this court and the jurisdiction below a fraud which they knew had been denounced in the severest terms by this court in an early case. It cannot be said that this alleged collusion was a collusion of the clients and not of the attorneys, because Mr. Galpin has sworn that the purchasing out of Hopkins by Ray, which the opposing brief denounces as a part of the conspiracy, was done under his advice, and the entire face of the case shows that the acts relied upon as indicating collusion are the acts generally of the attorneys.

In reply to the charge made in the affidavit of Gustav Sutro and also in the affidavit of Mr. Lewis, that Mr. Galpin was acting under the direction of Mr. Zeigler, it is only necessary for us to call attention to the affidavit of Mr. Wilbur G. Zeigler, from which it will appear that this charge is utterly without foundation.

S. SHELLABARGER,
J. M. WILSON,
Attorneys for Plaintiff in Error.

117-683

IN THE

Supreme Court of the United States

OCTOBER TERM 1885.

No. 1240

THERON R. HOPKINS, ~~Plaintiff~~ Deft in Error,

vs.

HENRY ZEIGLER, ~~Defendant~~ Plff in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Motion of ALBERT S. ROSENBAUM to Dismiss the Case.

D. M. DELMAS,
A. H. GARLAND,
Attorneys for Rosenbaum.

THOMAS MCGILL & CO., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term 1885.

THERON R. HOPKINS, Plaintiff in Error,
vs.
HENRY ZEIGLER, Defendant in Error. } No.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF CALIFORNIA.

MOTION OF ALBERT S. ROSENBAUM TO DISMISS THE CASE.

D. M. DELMAS,
A. H. GARLAND,
Attorneys for Rosenbaum.

Comes Albert S. Rosenbaum and moves the court to dismiss said cause, and in support thereof states:

The supposed or alleged action aforesaid was brought in the court below on a *Montgomery avenue* tax-deed, and the point ostensibly relied on by the supposed defendant below, was that the petition for opening the avenue was not signed by a majority of the property owners, apparently making a case under the act of the Legislature of California, dated April 1st, 1872, entitled "An act to open

and establish a public street in the city and county of San Francisco, to be called Montgomery avenue, and to take private lands therefor." Bonds to an amount of over fifteen hundred thousand dollars were issued by the proper authorities under said act, and were sold to various parties, and among them said Rosenbaum became the owner of a large number of said bonds, called and denominated the Montgomery-avenue bonds; and he is now proceeding against the treasurer of the city and county of San Francisco, in the proper court to compel the redemption of said bonds, according to the provisions of said act, as will more fully appear, reference being had to a copy of his complaint, filed for that purpose, herewith presented, marked Exhibit XI, and part of this motion.

There are also pending in other courts, in the State of California, legal proceedings on behalf of several other holders of Montgomery-avenue bonds, in different forms, to compel the redemption of such bonds, and in these suits all questions that can arise legitimately under such act will be considered and determined by the courts wherein such suits are pending, and will in due time, if a proper jurisdictional question is presented, be brought before this court for its judgment; and of these facts the parties to the aforesaid pretended suit are well aware. To present exhibits of copies of those suits and proceedings would make this record too voluminous, but it can be done if the court should deem it necessary.

Notwithstanding the pendency of these several suits, so well known to the country and especially to the parties in the above-mentioned assumed suit, and their counsel as well, said parties and their counsel having interests adverse to those of Rosenbaum and the other holders of said bonds, having no real dispute between themselves, but their interests being all the same, have brought and instituted the supposed suit, which is colorable only, purely fictitious and absolutely collusive, and gotten up in fact to cut off and

preclude any decision favorable to the holders of said Montgomery-avenue bonds. And such suit in fact presents only a portion of the questions involved, and those in a meagre and unsubstantial shape.

Indeed, the amount in controversy in the alleged suit fails to give this court any jurisdiction; and in support of this, the affidavit of T. B. Simpson, searcher of records in the city and county of San Francisco, is herewith presented as Exhibit X 2 and part hereof; a certified copy of the deed of said Theron R. Hopkins, dated September 6th, 1884, to J. J. Ray for the property asserted to be in litigation, as Exhibit X 3 and part hereof; the affidavits of five different real estate agents, (McAlester, Von Rhein, Dore, Cobb, and Sinton,) as Exhibit X 4 and part hereof; by which said papers it distinctly appears, that six hundred dollars ($600) would be a full valuation of such property.

Presented herewith, and as a part hereof, is the affidavit of Gustave Sutro, and marked "Exhibit X 5," showing the admissions of Daniel Rogers, Esq., the supposed attorney for the supposed plaintiff in the alleged suit of Zeigler *v.* Hopkins, establishing most clearly that the interest of the alleged litigants is identical, and that there is no dispute in truth between them; also the affidavit of Gustave Touchard, as Exhibit X 6 and part hereof, showing admissions of Hopkins, one of the supposed contestants in such suit, by which it appears the suit is one of the purest fiction; also the affidavit of George Lezinsky, as Exhibit X 7 and part hereof, to the same effect, if not stronger than the affidavit of Touchard; and also the affidavit of M. Lewis, agent for three of the holders of such bonds, who are foreigners, as Exhibit X 8 and part hereof, by which it appears that these foreign bondholders are proceeding to establish the validity of such bonds and to enforce their payment; and, in further corroboration of the other affidavits, showing by the conduct and admissions of the asserted parties and their counsel, that there is no real issue or dis-

pute between Zeigler and Hopkins, but the suit is manufactured entirely and solely for the purpose and with the view as hereinbefore stated.

The fact that this proceeding was collusive merely was not known to the other parties above named until near the close of the case, which was about the middle of last November, and too late for any of them to interpose if it had been otherwise allowable.

And even after it became apparent that there was no real issue or controversy between Zeigler and Hopkins, no one supposed that the case would be hurried to this court in such haste as to secure a submission and Decision of it at this term, as is now attempted to be done.

On the first intimation being given to the Bondholders aforesaid that such was the intention of the supposed litigants, they prepared at once to present to this court the real facts in reference to this proceeding, in order that their rights may not be prejudiced in any respect thereby.

All of which is respectfully submitted.

D. M. DELMAS,
A. H. GARLAND,
For Rosenbaum.

CITY OF WASHINGTON,
District of Columbia, } *ss.*

John Mullan, on first being duly sworn, says that he has read the foregoing Motion; that the matters therein contained he knows to be true, except those matters therein stated upon information and belief, and as to those matters he believes the same to be true.

JOHN MULLAN.

Subscribed and sworn to before me this 2d day of January, 1886.

[SEAL.] CHAS. B. BEALL,
Notary Public in and for the District of Columbia.

Exhibit X 1 to Motion to Dismiss.

In the Superior Court of the City and County of San Francisco, State of California.

ALBERT S. ROSENBAUM, *Plaintiff*,
v.
JOHN A. BAUER, Treasurer of the City and County of San Francisco, *Defendant*. } COMPLAINT.

The plaintiff above named complains of the defendant above named, and, for cause of action, avers that:

I.

The plaintiff is a citizen of the State of New York.

II.

The defendant is, and for more than six months last past has been, the Treasurer of the City and County of San Francisco.

III.

On the first day of April, 1872, the Legislature of the State of California passed an Act entitled: "An Act to open and establish a public street in the City and County of San Francisco, to be called 'Montgomery Avenue,' and to take private lands therefor."

IV.

Thereafter, the owners of a majority in frontage of the property described in Section four of said Act, as said owners are and were named in the then last-preceding annual assessment-roll for the State, City and County taxes, did petition the then Mayor of said City and County, in writing, for the opening of Montgomery Avenue, according to the provisions of said Act. Said written petition was presented to said Mayor, in the month of June, A. D. 1872; and it, upon its face, purported to be, and stated that it was, and it, in fact, was, signed by the owners of a majority in front-

age of the property described in Section four of said Act, as said owners were named in the then last-preceding annual assessment-roll for said State, City and County taxes. On the 19th day of June, 1872, the then Mayor of said City and County, William Alvord, affixed to said petition his certificate in writing, signed by him in his said official capacity, and bearing the seal of said City and County, which said certificate is in the words and figures following, to wit:

"SAN FRANCISCO, June 19th, 1872.

MAYOR'S OFFICE,

City and County of San Francisco.

I, Wiliam Alvord, Mayor of the City and County of San Francisco, do hereby certify that the foregoing petition, accompanied by the certificates of R. H. Stretch, Surveyor of the City and County of San Francisco, and Alexander Austin, Tax Collector of said City and County of San Francisco, was presented to me, and I find the same to be in all respects in due form, and that the signatures, on said petition, are the *bona fide* signatures of the parties represented, and that they, and each of them, claim to own and hold said property signed for by them, and each of them, as appears on the assessment roll of the last-preceding annual assessment, and also as appears by their said signatures, and that such petition represents over a majority in frontage of the property described in Section Four of the Act of the Legislature of the State of California entitled 'An Act to open and establish a public street in the City and County of San Francisco, to be called Montgomery Avenue, and to take private lands therefor,' approved April 1, 1872, and also a majority in frontage, as appears by the last-preceding annual assessment roll for the State, City and County taxes, being for the fiscal year of 1871–1872.

It is, therefore, by me ordered that the Board of Public Works, as created by Section Nineteen of said Act above named, proceed to organize by the election of a President.

Witness my hand and official seal this nineteenth day of June, A. D. 1872.

[Seal of the City and County of San Francisco.] WILLIAM ALVORD,

Mayor of the City and County of San Franciso."

Thereafter on the 20th day of June, 1872, said Mayor, and the then City and County Surveyor, and the then Tax-Collector of said City and County, met together as the Board of Public Works, named in said Act, and did make and enter, and cause to be entered upon the official record book of the proceedings of said Board of Public Works, the following entry, to wit:

"Be it remembered, that on the eighteenth day of June, A. D. 1872, at the Mayor's office, in the City Hall, in the City and County of San Francisco, it appearing that the owners of more than a majority in frontage of all the property described in Section Four of the Act of the Legislature of the State of California entitled 'An Act to open and establish a public street in the City and County of San Francisco, to be called Montgomery Avenue, and to take private lands therefor,' approved April 1, 1872, and also, as said owners are named in the last preceding and the last annual assessment roll for the State, City and County taxes, being for the year 1871–1872, did petition William Alvord, Mayor of said City and County of San Francisco, in writing, for the opening of Montgomery Avenue, according to the provisions of the said Act of the Legislature last above named, which petition is in words and figures following, to wit:"

(Here in said record book is copied at length the petition hereinabove referred to, together with the hereinabove mentioned certificate of said Mayor.)

"Whereupon, on the twentieth day of June, A. D. 1872, at the City Hall, in the City and County of San Francisco, said Board of Public Works, composed of William Alvord, Mayor of the City and County of San Francisco, Alexander Austin, Tax Collector of the City and County of San Francisco, and R. H. Stretch, Surveyor of said City and County of San Francisco, proceeded and did organize by electing

WILLIAM ALVORD,
President thereof,
and H. S. TIBBEY,
Secretary thereof,
and M. M. ESTEE,
Attorney for said Board."

Thereupon, said Board of Public Works, on said 20th day of June, 1872, did organize by electing said Mayor, President of said Board; and caused the aforesaid certificate, relating to said petition, to be spread upon the official record book of their proceedings as such Board of Public Works.

V.

After their organization aforesaid, said Board of Public Works did make a written report, in conformity to and in accordance with the provisions of section six of said Act. Said report was signed by all the members of said Board. Said report was completed on the 26th day of September, A. D. 1872. Said report was left at the office of said Board, in the City and County of San Francisco, daily, during ordinary business hours, for thirty days from the 26th day of September, A. D. 1872, for the free inspection of all parties interested; and notice that the same was so open for inspection for such time and such place, was published by said Board daily, for twenty days, in two daily newspapers printed and published in said City and County, the first of said publications being on said 26th day of September, A. D. 1872.

VI.

No application by petition or otherwise having been made by any person to the County Court of the City and County of San Francisco, setting forth any objection to said report, said Board did, on the 2d day of November, A. D. 1872, present said report to said court, with a petition to said court that the same be approved and confirmed by said court. Such proceedings were thereupon had in said court, that thereafter, to wit, on the 14th day of November, 1872, an order was by said court duly given, made and entered on its minutes, approving and confirming said report. In said order, said court does in express words and terms adjudge and decree that, under and pursuant to the provisions of section five of said Act, on the 18th day of June, 1872, the actual owners of more than a majority in frontage of the property described in section four of the said Act, and the owners of more than a majority in frontage of the property described therein, as the same are named or appeared on the last preceding annual assessment roll for the State, city

and county taxes for the City and County of San Francisco, petitioned his Honor, Wm. Alvord, the Mayor of said City and County of San Francisco, in writing, requesting and demanding the opening of said Montgomery Avenue, according to the provisions of said Act; that all the proceedings taken therein were duly and legally taken; that each and all of the acts, matters, and things provided by said Act to be done and performed by said Board of Public Works in the premises have, on the part of said Board, been duly and regularly done and performed in the form, at the times, and in the manner prescribed by said Act.

No appeal was ever taken by any person from said order of said court, and the said order, from the entry thereof, has remained and still remains in full force and effect.

VII.

After the order of the County Court aforesaid, and in pursuance of and conformity with the provisions of said Act, said Board of Public Works did execute one thousand five hundred and seventy-nine bonds, in the sum of one thousand dollars each, aggregating in all $1,579,000. Said bonds were dated January 1st, 1873, and were, upon their face, made payable in thirty years from their date, unless sooner redeemed as in the aforesaid Act provided, and bore interest at the rate of six per cent. per annum, payable semi-annually at the office of the Treasurer of said City and County of San Francisco. To each of said bonds, sixty coupons, for the interest thereon, at the rate aforesaid, and payable as aforesaid, were attached. Said bonds were, and each of them was, signed by all the members of said Board of Public Works, and to each of them was affixed the seal of said Board of Public Works. Each of said coupons was signed by the President of said Board of Public Works. Said amount of bonds, to wit, $1,579,000, was the amount necessary to pay and discharge all the damages, cost and expenses arising from or incidental to the opening of said avenue as fixed and determined by the final confirmation aforesaid of the report aforesaid.

VIII.

On the 28th day of November, A. D. 1872, the Mayor, Auditor and Treasurer of said City and County of San

Francisco, in pursuance of the provisions of the aforesaid Act, caused to be published—and said publication was continued daily for a period of sixty consecutive days thereafter—in four daily newspapers published in said City and County of San Francisco, to wit, *Daily Alta California, Evening Bulletin, Morning Call* and *San Francisco Chronicle*, the following advertisement, to wit:

"Montgomery Avenue Bonds.—Sealed proposals will be received at the office of the Treasurer of the City and County of San Francisco, State of California, City Hall, San Francisco, until Tuesday, January 28th, 1873, at 12 o'clock noon, for the purchase of Montgomery Avenue Bonds, authorized to be issued by the Board of Public Works of said City and County, as provided by an Act of the Legislature of the State of California, entitled an Act to open and establish a public street in the City and County of San Francisco, to be called 'Montgomery Avenue,' and to take private lands therefor, approved April 1st, 1872.

Said bonds are of the denomination of $1,000 each, payable in thirty years from January 1st, 1873, and bear interest at the rate of six per cent. per annum, payable semi-annually, on the first day of July and the first day of January of each year, at the office of the Treasurer of the City and County of San Francisco. Interest coupons are attached to each bond, and are, at the option of the holder, receivable in payment of all taxes levied under said Act. Principal and interest are payable in gold coin of the United States of America.

The Act provides for a sinking fund. The damages to be paid for the opening of the avenue amount to the sum of $1,244,737 $\frac{26}{100}$, as ascertained and certified by decree final, on the 14th of November, 1872.

The property liable under said Act and Decree for the payment of the bonds, principal and interest, is assessed, for the purpose of general taxation for the present fiscal year, at sixty-five millions of dollars ($65,000,000,) and said property stands pledged for the redemption of these bonds.

Bonds at par, to the amount of one hundred and fifty-eight thousand dollars ($158,000), have already been accepted by and delivered to parties damaged, leaving one million eighty-six thousand seven hundred and thirty-seven $\frac{26}{100}$ dollars ($1,086,737 $\frac{26}{100}$,) to be provided for by the sale of bonds.

Parties damaged have a preference over other bidders where the bids are at the same rate, to the extent of their assessed damages. Bidders will state the rate per cent. at which they will purchase any portion of said bonds, payable in gold coin of the United States, and each bid must be accompanitd by a bond (except from bidders entitled to damages) satisfactory to the Mayor, Auditor and Treasurer, conditional that if any award be made, the terms of the bid will be complied with.

Bids must be addressed to the Mayor, Auditor and Treasurer of the City and County of San Francisco, City Hall, San Francisco, California, and endorsed 'Proposals for the purchase of Montgomery Avenue Bonds.'

The Mayor, Auditor and Treasurer reserve the right to reject any and all unreasonable bids.

Dated at the City Hall, San Francisco, Nov. 27th, 1872.

WILLIAM ALVORD,
Mayor of the City and County of San Francisco.

MONROE ASHBURY,
Auditor of the City and County of San Francisco.

JOHN A. BAUER,
Treasurer of the City and County of San Francisco."

In pursuance of said advertisement, the bonds hereinafter mentioned were, among others, sold and disposed of, for a valuable consideration in money paid by the purchaser, by said Mayor, Treasurer and Auditor, and the purchase price thereof was paid to said Treasurer, and by him placed in the "Montgomery Avenue Fund," created by section ten of the Act of the Legislature hereinabove referred to.

IX.

The sum of money paid out of the General Fund of the Treasury of the City and County of San Francisco, under and in pursuance of an Act entitled an Act to repeal an Act entitled an Act to make, open, and establish a public street in the City and County of San Francisco, to be called Montgomery Avenue, and to take private lands therefor, approved March twenty-ninth, eighteen hundred and seventy, and to provide for the payment of the expenses incurred under said Act, approved March first, eighteen hundred and seventy-two, was not deemed or held by said Board of

Public Works, nor by said County Court, to constitute a part of the cost of said Mongomery Avenue, nor was the same included in the report of said Board as finally approved and confirmed by said court as aforesaid, nor was any part of the money raised by the sale of Montgomery Avenue bonds, as aforesaid, paid into the General Fund of said City and County for the purpose of restoring the sum of money thus paid out, nor for any purpose whatever, nor at all.

X.

After the sale of the bonds aforesaid, said Board of Public Works caused said Montgomery Avenue to be opened in conformity with the provisions of said Act, and did pay in full all damages and liabilities fixed by the final report of said Board, as approved and confirmed as aforesaid, and did receive from the parties entitled thereto proper conveyances to the City and County of San Francisco for all property taken for the opening of said avenue under the provisions of said Act.

Thereafter, to wit, on the twenty-first day of September, 1874, said Board of Public Works did transfer the said avenue so opened, and the possession and control thereof, to the municipal authorities of said City and County of San Francisco, to be forever used as an open public street; said municipal authorities thereupon took and accepted said avenue as an open public street, and caused the same to be sewered, graded, sidewalked, planked and paved in accordance with the rules, regulations, statutes and ordinances applicable to the other public streets of the City and County of San Francisco; and said avenue has ever since been maintained and kept by said municipal authorities in accordance with said rules, regulations, statutes and ordinances as a public street of said City and County; and said avenue ever since has been, and now is, used as an open, public street of said City and County; and the title thereto has been, and now is, vested in said City and County for said purpose forever, as the title of other public streets in said City and County is vested. The length of the avenue so opened is 6,226 feet.

XI.

There has been levied, assessed and collected annually, commencing with the year eighteen hundred and eighty,

in said City and County, a tax of one per cent. upon each one hundred dollars valuation upon the lands described in section four of the hereinabove mentioned Act, for a Sinking Fund for the redemption of the Montgomery Avenue bonds aforesaid. Said tax was levied, assessed and collected, at the same time and in the same manner as other taxes were levied, assessed and collected in said City and County, and upon the lands aforesaid, according to the enhanced values of the respective parcels of said land, as fixed in the hereinabove mentioned final report of said Board of Public Works, as finally approved and confirmed by the County Court as aforesaid.

XII.

The moneys collected by reason and virtue of said tax, when collected, were paid over to the Treasurer of said City and County, and did thenceforth and now do constitute a part of the Montgomery Avenue Fund, to be paid out in redeeming the Montgomery Avenue bonds aforesaid. There is now, and has been for more than a month last past, in the hands of the defendant, as Treasurer, as aforesaid, the sum of $12,318 $\frac{20}{100}$ of moneys paid, as aforesaid, from the tax as aforesaid.

XIII.

Notwithstanding the fact that said defendant, as Treasurer aforesaid, has had in his custody, during the period aforesaid, the aforesaid sum belonging to the said Montgomery Avenue Fund, as a Sinking Fund, yet he has never advertised for the surrender of said Montgomery Avenue bonds, as provided in section eleven of said Act, or at all.

XIV.

At the sale of said bonds hereinabove mentioned parties purchased as aforesaid, in good faith and for a valuable consideration and without notice of any defect therein, twenty-one of said bonds, numbered respectively as follows:

....
....
....
....
.....

and all coupons of interest then unpaid thereon. Which bonds are all, with the exception of the numbers thereof, in the words and figures following:

"State of California, United States of America.
Board of Public Works, City and County of San Francisco.

$1,000. Number..... $1,000.

Montgomery Avenue bond, in conformity with an Act passed by the people of the State of California, represented in Senate and Assembly, entitled 'An Act to open and establish a public street in the City and County of San Francisco, to be called Montgomery Avenue, and to take private lands therefor,' approved April 1, 1872.

The Treasurer of the City and County of San Francisco, State of California, will pay at his office, in said City and County, to the holder hereof, one thousand dollars in United States gold coin, with interest at the rate of six per cent. per annum, payable semi-annually, in like gold coin, upon surrender of the corresponding coupons, and that the principal sum is redeemable within thirty years from the date of these presents.

It being understood and agreed that this bond may be redeemed by said Treasurer as provided in said above mentioned Act of the Legislature of the State of California.

In witness whereof, the Mayor, the Tax Collector, and City and County Surveyor of said City and County of San Francisco, composing a Board of Public Works, have respectively signed these presents, and the President of the Board of Public Works has signed the annexed coupons as of the first day of January, 1873.

[Seal of the Board of Public Works.]

WILLIAM ALVORD,
President of the Board of Public Works, and
Mayor of the City and County of San Francisco.

ALEXANDER AUSTIN,
Tax Collector and Member of said Board of Public Works.

RICHARD H. STRETCH,
City and County Surveyor, and
Member of said Board of Public Works."

XV.

Plaintiff has been, ever since the purchase hereinabove mentioned, and still is, the owner and holder of the twenty-one bonds aforesaid, having purchased the same in good faith, for a valuable consideration, and without notice of any defect therein.

On the first day of October, 1885, said plaintiff presented himself before the defendant, as Treasurer of the City and County of San Francisco, at his office, and exhibited to him the twenty-one bonds aforesaid, belonging to said plaintiff, and then and there demanded of him, as Treasurer aforesaid, that he do advertise for the space of ten days, Sundays excepted, in two daily newspapers published in the City and County of San Francisco, for sealed proposals, to be opened after the expiration of said ten days, by said Treasurer, in the presence of the Mayor and the bidders, if they or any of them shall elect to be present, for the surrender of bonds issued under the aforesaid Act, stating the amount of money in the custody of said Treasurer for the purpose of said redemption, to wit, $12,318.20.

But said defendant then and there failed, neglected and refused, and ever did and still does fail, neglect and refuse to comply with said demand; and then and there failed, neglected and refused, and ever did and still does fail, neglect and refuse to advertise as requested, or at all, for the redemption of said bonds.

XVI.

Said bonds have not, nor has any one of said bonds, nor any part thereof, nor the money due thereon, ever been paid.

Wherefore, plaintiff prays judgment against said defendant, that said defendant, as Treasurer of the City and County of San Francisco, be commanded to advertise for the redemption of Montgomery Avenue bonds, as in section eleven of the Act hereinabove referred to provided.

D. M. DELMAS,
Att'y for Plaintiff.

A. L. RHODES AND J. P. HOGE,
Of Counsel.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

....., being first duly sworn, doth depose and say: That he is the agent of the above-named plaintiff,.....in the State of California; that said plaintiff is absent from said State; that the facts stated in the foregoing complaint are within the knowledge of affiant, and, therefore, he makes this verification; that the foregoing complaint is true of affiant's own knowledge.

Subscribed and sworn to before me, }
this.....day of..... }

Exhibit X 2 to Motion to Dismiss.

AFFIDAVIT OF SEARCHER AS TO ASSESSMENT OF PROPERTY.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

T. B. Simpson, being sworn, says that he is, and for 22 years last past has been, a Searcher of Records in the city and county of San Francisco, State of California. That the following described lot of land, situate in said city and county, to wit: Commencing at a point on the southerly side of Francisco street, distant 123 feet easterly from the easterly side of Van Ness avenue, thence running easterly along said line of Francisco street $37\frac{6}{12}$ feet; thence at right angles southerly $137\frac{6}{12}$ feet; thence at right angles westerly $37\frac{6}{12}$ feet, and thence at right angles northerly $137\frac{6}{12}$ feet to the point of commencement, and being a portion of Western addition, block number forty-one, (41,) has been assessed upon the assessment roll of said city and county of San Francisco, from and including the year 1878–79 to and including the year 1885, as follows, to wit:

For the year 1878–79, at the sum of.....	$360 00
For the year 1879–80, at the sum of.....	360 00
For the year 1880–81, at the sum of.....	360 00
For the year 1881–82, at the sum of.....	360 00
For the year 1882, at the sum of.....	360 00
For the year 1883, at the sum of.....	360 00
For the year 1884, at the sum of.....	400 00
And for the year 1885, at the sum of.....	400 00

(being the current fiscal year.) That during the whole of said time there has been no improvements assessed upon the said lot of land. That the enhanced value of said land as assessed upon the assessment roll of said city and county of San Francisco, for taxes for the opening of Montgomery avenue, is the sum of three hundred and ninety-one (391) dollars. That there is no assessment for taxes for the opening of Montgomery avenue for the year 1885.

THOS. B. SIMPSON.

Subscribed and sworn to before me this 17th day of November, A. D. 1885.

[SEAL.] E. P. CASSERLY,
Deputy County Clerk, and Ex-Officio
Deputy Clerk of the Superior Court.

Exhibit X 3 to Motion to Dismiss.

CERTIFED COPY HOPKINS DEED, SHOWING VALUE OF PROPERTY.

Theron R. Hopkins to J. J. Rey.

For and in consideration of the sum of six hundred (600) dollars to me in hand paid, I, Theron R. Hopkins, of the city and county of San Francisco, State of California, do hereby grant, bargain, and sell unto J. J. Rey, of the city and county of San Francisco, State of California, all that real property situated in the city and county of San Francisco, and State of California, bounded and described as follows:

Commencing at a point on the southerly line of Francisco street, distant one hundred and twenty-three (123) feet easterly from Van Ness avenue; thence running easterly along said line of Francisco street thirty-seven feet six inches ($37\frac{6}{12}$); thence at right angles southerly one hundred and thirty-seven feet and six inches ($137\frac{6}{12}$); thence at right angles westerly thirty-seven feet six inches ($37\frac{6}{12}$), and thence at right angles northerly one hundred and thirty-seven feet and six inches ($137\frac{6}{12}$) to the point of beginning.

The mortgage on said premises now held by the Union

Insurance Company to be released by the grantor within thirty days from date.

Witness my hand and seal this nineteenth day of August, 1884.

THERON R. HOPKINS. [SEAL.]

Signed, sealed, and delivered in the presence of—
LOUIS DUTERTRE,
WILLIAM F. GIBSON.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.

On this sixth day of September, in the year A. D. one thousand eight hundred and eighty-four, before me, P. J. Sullivan, a notary public in and for said city and county, personally appeared Louis Dutertre, personally known to me to be the same person whose name is subscribed to the within and annexed instrument as a witness thereto, who, being by me duly sworn, deposes and says that Theron R. Hopkins, whose name is subscribed to the within and annexed instrument as a party thereto, is personally known to him to be the same person who is described therein as party thereto, and that he saw the said Theron R. Hopkins sign and execute the same, and that he (the deponent) thereupon signed his name thereto as a subscribing witness.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year last above written.

[SEAL.] P. J. SULLIVAN,
Notary Public.

A true copy of original recorded at request of J. J. Rey, September 6, 1884, at 20 min. past 2 P. M.

WM. J. BRYAN,
County Recorder.

Liber 1134 Deeds, page 108.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.

I, D. M. Cashin, county recorder, do hereby certify that the annexed is a whole, true, and correct copy of an original record, as will appear by reference to Book 1134 of

Deeds, page 108, now in my office, and that said copy has been compared with the original, and is a correct transcript therefrom.

Witness my hand and official seal this 30th day of November, A. D. 1885.

[SEAL.]

D. M. CASHIN,
County Recorder.
Per D. S. CULP,
Deputy.

Exhibit X 4 to Motion to Dismiss.

AFFIDAVITS OF REAL ESTATE AGENTS AS TO VALUE OF PROPERTY.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.

William F. McAlester, being first duly sworn, says that he is and for more than 22 (twenty-two) years last past has been a real estate agent doing business in the city and county of San Francisco, State of California, and as such is well informed of and knows the values of real estate situate in said city and county, and the value of the lot of land hereinafter mentioned; that the highest value of the said lot of land is the sum of $500.00, and that the said value has not any time during the three (3) years last past exceeded said sum of $500.00.

The said lot of land herein referred to is that certain lot, situate in said city and county, commencing at a point on the southerly side of Francisco street distant 123 feet easterly from Van Ness avenue, thence running easterly along said line of Francisco street 37 feet and 6 inches, thence at right angles southerly 137 feet and 6 inches, thence at right angles westerly 37 feet and 6 inches, and thence at right angles northerly 137 feet and 6 inches to the point of commencement.

WM. F. MCALESTER.

Subscribed and sworn to before me this 27th day of November, 1885.

[SEAL.]

LEE D. CRAIG,
Notary Public.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

I, Jas. J. Flynn, county clerk of the city and county of San Francisco, State of California, and *ex-officio* clerk of the Superior Court thereof (which court is a court of record, having a seal,) do hereby certify that Lee D. Craig, Esq., whose name is subscribed to the *annexed jurats*, was, at the time of signing the same, a notary public in and for said city and county, duly commissioned and qualified, and authorized by law to administer oaths, etc., and full faith and credit are due to all his official acts as such notary.

And I do further certify that I am well acquainted with the handwriting of the said notary public, and verily believe that the signatures to the said *annexed jurats* are genuine.

In witness whereof I have hereunto set my hand and affixed the seal of the said Superior Court, at my office, in said city and county, this 4th day of December, A. D. 1885.

[SEAL.] JAS. J. FLYNN,
County Clerk, and ex-officio Clerk of the
Superior Court.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

O. F. Von Rhein, being first duly sworn, says that he is, and for more than twenty years last past has been, a real estate agent, doing business in the city and county of San Francisco, State of California, and as such is well informed of and knows the values of real estate situate in said city and county, and the value of the lot of land hereinafter mentioned; that the highest value of the said lot of land is the sum of $400, and that the said value has not at any time during the three (3) years last past exceeded said sum of four hundred dollars.

The said lot of land herein referred to is that certain lot, situate in said city and county, commencing at a point on the southerly side of Francisco street, distant 123 feet easterly from Van Ness avenue, thence running easterly along said line of Francisco street 37 feet and 6 inches, thence at right angles southerly 137 feet and 6 inches, thence at right angles westerly 37 feet and 6 inches, and thence at

right angles northerly 137 feet and 6 inches to the point of commencement.

O. F. VON RHEIN.

Subscribed and sworn to before me this 27th day of November, 1885.

[SEAL.] LEE D. CRAIG,
Notary Public.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.

Maurice Dore, being first duly sworn, says that he is and for more than twenty-five (25) years last past has been a real estate agent, doing business in the city and county of San Francisco, State of California, and as such is well informed of and knows the values of real estate situate in said city and county, and the value of the lot of land hereinafter mentioned; that the highest value of the said lot of land is the sum of $600.00, and that the said value has not at any time during the three (3) years last past exceeded said sum of $600.00.

The said lot of land herein referred to is that certain lot, situate in said city and county, commencing at a point on the southerly side of Francisco street, distant 123 feet easterly from Van Ness avenue, thence running easterly along said line of Francisco street 37 feet and 6 inches, thence at right angles southerly 137 feet and 6 inches, thence at right angles westerly 37 feet and 6 inches, and thence at right angles northerly 137 feet and 6 inches to the point of commencement.

MAURICE DORE.

Subscribed and sworn to before me this 27th day of November, 1885.

[SEAL.] LEE D. CRAIG,
Notary Public.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.

H. A. Cobb, being first duly sworn, says that he is and for more than thirty years last past has been a real estate agent, doing business in the city and county of San Fran-

cisco, State of California, and as such is well informed of and knows the values of real estate situate in said city and county, and the value of the lot of land hereinafter mentioned; that the highest value of the said lot of land is the sum of $600, and that the said value has not at any time during the three (3) years last past exceeded said sum of $600.

The said lot of land herein referred to is that certain lot, situate in said city and county, commencing at a point on the southerly side of Francisco street, distant 123 feet easterly from Van Ness avenue, thence running easterly along said line of Francisco street 37 feet and 6 inches, thence at right angles southerly 137 feet and 6 inches, thence at right angles westerly 37 feet and 6 inches, and thence at right angles northerly 137 feet and 6 inches to the point of commencement.

H. A. COBB.

Subscribed and sworn to before me this 27th day of November, 1885.

[SEAL.] LEE D. CRAIG,
Notary Public.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.

Richard H. Sinton, being first duly sworn, says that he is and for more than thirty years last past has been a real estate agent, doing business in the city and county of San Francisco, State of California, and as such is well informed of and knows the values of real estate situate in said city and county, and the value of the lot of land hereinafter mentioned; that the highest value of the said lot of land is the sum of $500, and that the said value has not at any time during the three (3) years last past exceeded said sum of $500.

The said lot of land herein referred to is that certain lot, situate in said city and county, commencing at a point on the southerly side of Francisco street, distant 123 feet easterly from Van Ness avenue, thence running easterly along said line of Francisco street 37 feet and 6 inches, thence at right angles southerly 137 feet and 6 inches, thence at right angles westerly 37 feet and 6 inches, and thence at

right angles northerly 137 feet and 6 inches to the point of commencement.

R. H. SINTON,
116 Montg'y street, San Francisco.

Subscribed and sworn to before me this 27th day of November, 1885.

[SEAL.] LEE D. CRAIG,
Notary Public.

Exhibit X 5 to Motion to Dismiss.

AFFIDAVIT AS TO ADMISSION OF ROGERS.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.

Gustav Sutro, being first duly sworn, deposes and says that he is a resident of the city and county of San Francisco, State of California. That on or about the 15th day of November, 1885, Daniel Rogers, Esq., attorney for the plaintiff in the cause of Zeigler *v.* Hopkins, numbered 3259, in the Circuit Court of the United States, Ninth Circuit, District of California, stated to affiant that the costs and expenses of the plaintiff in said cause had been paid to him (Rogers) "by the other side," and when affiant asked him whom he called the other side, said Rogers replied, "Galpin." Said Rogers further stated to affiant that he (Rogers) had no money to pay for the costs of taking the appeal and printing the brief on appeal on behalf of the plaintiff in said cause; and that the said matters would be paid for by said Galpin. Said Rogers further stated to affiant that he (Rogers) had never seen said Henry Zeigler, the plaintiff in said action; and that said cause had been put in his hands by, and he had since said time carried on said suit according to the directions of, Mr. Zeigler, who is associated with, and in the office of, said Galpin.

And further affiant sayeth not.

GUSTAV SUTRO.

Subscribed and sworn to before me this 4th day of December, 1885.

[SEAL.] LEE D. CRAIG,
Notary Public.

Exhibit X 6 to Motion to Dismiss.

AFFIDAVIT AS TO ADMISSIONS OF HOPKINS.

STATE OF CALIFORNIA, City and County of San Francisco, } ss.

Gustave Touchard, being first duly sworn, deposes and says that he is a resident of the city and county of San Francisco, State of California; that he knows Theron R. Hopkins, the defendant in the cause of Henry Zeigler *v.* Theron R. Hopkins, numbered 3259, in the Circuit Court of the United States, Ninth Circuit, District of California; that on the 27th day of November, 1885, the said Theron R. Hopkins stated to affiant as follows, to wit:

"I do not now own or have any interest in the lot sued for in Zeigler *v.* Hopkins. I have had no interest in said property since about the 6th day of September, 1884. On that day I sold said property to one J. J. Rey, for the sum of $600. At the time said suit was commenced I was in poor health and very feeble and confined to my house. Some time thereafter, and before the said sale, I was visited by Mr. Philip G. Galpin, who informed me that he had called upon me in relation to the said suit, and he informed me that said suit had been brought as a test case. I asked him why they had not selected some one else, as I was a very sick man. Whereupon Galpin said that they would buy the property from me and carry on the litigation themselves, and would relieve me of all liability in the matter. Mr. Dutertre, who has been so actively engaged in contesting the matter of payment of taxes for paying the interest and bonds for the opening of Montgomery avenue, called to see me in regard to the negotiation of the sale of said property in said suit. He said that they would have the property appraised to fix a purchase price, and this was done, and he informed me that they would pay me $600 for the property. I considered this a very good price for the property, and accepted it. The money was paid to me by Mr. Dutertre, and I executed a deed therefor to J. J. Rey. This deed expresses the true consideration, and no other consideration was received by me. They asked permission of me to continue the suit in my name as defend-

ant, and said they would retain Wm. F. Gibson, the attorney, who until then had appeared for me in the suit. I gave them permission so to do. Neither myself or my attorney until these gentlemen came to see me knew that this suit was in any way connected with the matter of the opening of Montgomery avenue. Since I made the said sale of said property I have had nothing in any form or manner to do with the said suit or litigation, or paid any of the costs, expenses, or attorneys' fees for carrying on said suit on behalf of defendant."

Affiant further states that said statement above-mentioned was made by said Hopkins to him in the presence of Mrs. Heard, the sister of said Hopkins, and in the presence of Mr. George Lezinsky, an attorney-at-law, in said city and county of San Francisco.

Affiant further states that he is the president of the Union Insurance Company, an insurance corporation of said State of California, and having its principal office and place of business at said city and county of San Francisco; that at the time of the filing of the complaint in said action of Zeigler *v.* Hopkins, the said Union Insurance Company held a mortgage on the said lot of land sued for in said action, executed to it by said Hopkins; that said mortgage was given to secure a note of $26,500; that said mortgage included a lot of land adjoining said lot above mentioned, being situate on the southeast corner of Francisco street and Van Ness avenue, and having a frontage of 123 feet on Francisco street, and 137½ feet on Van Ness avenue, and other property; that said company in taking the said mortgage did not consider the said lot of land sued for in said action and the said lot adjoining of any value, but they were included in said mortgage as additional security for the debt secured thereby; that the property included in said mortgage other than said two lots last mentioned, was considered by said company as the real security for said indebtedness; that or or about the 4th day of September, 1884, the said Theron R. Hopkins applied to said company for a release of said mortgage as to the property sued for in said action; that said company consented to release the same upon the payment to it by said Hopkins of the sum of four hundred ($400) dollars, which was the value placed upon said lot by affiant as the president of said company; that said Hopkins thereupon paid to said company the said

sum of four hundred ($400) dollars, and said company executed to said Hopkins a release of said lot of land, a certified copy of which release is hereto attached and made a part hereof; that before the said payment above mentioned, said Hopkins had made other payments on said note.

That affiant is now, and has been for eighteen years last past, the president of said Union Insurance Company, and has for many years been a director and trustee of various corporations and savings banks in said city and county of San Francisco.

That affiant in such capacities has dealt very extensively with real estate situate in said city and county of San Francisco, and well knows the values of real estate in said city and county; that the sum of four hundred ($400) dollars is, and has been for more than three years last past, in the estimation of affiant, the full value of said lot of land.

And further affiant sayeth not.

GUSTAVE TOUCHARD.

Subscribed and sworn to before me this 4th day of December, 1885.

[SEAL.] LEE D. CRAIG,
Notary Public.

UNION INSURANCE COMPANY
to
T. R. HOPKINS.

SAN FRANCISCO, *Sept. 5th*, 1884.

In consideration of the payment to the Union Insurance Company of the sum of four hundred dollars by Theron R. Hopkins, the said Union Insurance Company hereby release from the lien of the mortgage made to it by the said Theron R. Hopkins, dated the 26th day of April, 1882, and recorded in the office of the county recorder of the city and county of San Francisco, in liber 670 of mortgages, page 63, &c., the lot of ground (part of said mortgaged premises) described as follows, to wit:

Beginning at a point on the southerly line of Francisco street, distant one hundred and twenty-three (123) feet easterly from the easterly line of Van Ness avenue, running thence easterly along said line of Francisco street

thirty-seven (37) feet and six (6) inches, thence at right angles southerly one hundred and thirty-seven (137) feet and six (6) inches, thence at right angles westerly thirty-seven (37) feet and six (6) inches, thence at right angles northerly one hundred and thirty-seven (137) feet and six (6) inches to the point of beginning.

Nothing herein contained shall in any manner be deemed as affecting the lien of said mortgage upon the remainder of the property described therein for the balance of the principal sum now due thereon, to wit, twenty-one thousand one hundred ($21,100) dollars.

UNION INSURANCE COMPANY,
By GSV. TOUCHARD, President.
[SEAL.] JAS. D. BAILEY, Secretary.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.

On the fifth day of September, A. D. one thousand eight hundred and eighty-four, before me, E. V. Joice, notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared Gustave Touchard, president, and James D. Bailey, secretary, known to me the president and secretary of the corporation that executed the above instrument, and acknowledged to me that such corporation executed the same.

Witness my hand and official seal.

[SEAL.] E. V. JOICE,
Notary Public.

A true copy of the original recorded at request of T. R. Hopkins, September 6th, 1884, at 35 mins. past 11 A.M.

WM. J. BRYAN,
County Recorder.

Vol. 119, Releases of Mortgages, page 2.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.

I, D. M. Cashin, county recorder, do hereby certify that the annexed is a whole, true, and correct copy of an original record, as will appear by reference to book 119 of Releases of Mortgages, page 2, now in my office, and that

said copy has been compared with the original, and is a correct transcript therefrom.

Witness my hand and official seal this 30th day of November, A. D. 1885.

D. M. CASHIN, County Recorder,
[SEAL.] per D. S. CULP, Deputy.

Exhibit X 7 to Motion to Dismiss.

ADMISSIONS OF HOPKINS.

STATE OF CALIFORNIA, } ss.
City and County of San Francisco, }

George Lezinsky, being first duly sworn, deposes and says that he is an attorney and counsellor at law, residing and having his office at the city and county of San Francisco, State of California; that he knows Theron R. Hopkins, the defendant in the cause of Henry Zeigler *v.* Theron R. Hopkins, numbered 3259, in the Circuit Court of the United States, Ninth Circuit, District of California.

That on the 27th day of November, 1885, the said Theron R. Hopkins stated to affiant as follows, to wit:

"I do not now own or have any interest in the lot sued for in Zeigler *v.* Hopkins; I have had no interest in said property since about the 6th day of September, 1884. On that day I sold said property to one J. J. Rey, for the sum of $600. At the time said suit was commenced, I was in poor health and very feeble and confined to my house. Some time thereafter, and before the said sale, I was visited by Mr. Philip G. Galpin, who informed me that he had called upon me in relation to the said suit, and he informed me that said suit had been brought as a test case. I asked him why they had not selected some one else, as I was a very sick man. Whereupon Galpin said that they would buy the property from me and carry on the litigation themselves, and would relieve me of all liability in the matter. Mr. Dutertre, who has been so actively engaged in contesting the matter of payment of taxes for paying the interest and bonds for the opening of Montgomery avenue, called to see me in regard to the negotiation of the sale of said property in said suit. He said that he would have the property ap-

praised to fix a purchase price, and this was done, and he informed me that they would pay me $600 for the property. I considered this a very good price for the property and accepted it. The money was paid to me by Mr. Dutertre, and I executed a deed therefor to J. J. Rey. This deed expresses the true consideration, and no other consideration was received by me. They asked permission of me to continue the suit in my name as defendant, and said they would retain Wm. F. Gibson, the attorney who until then had appeared for me in the suit. I gave them permission so to do. Neither myself nor my attorney, until these gentlemen came to see me, knew that this suit was in any way connected with the matter of the opening of Montgomery avenue. Since I made the said sale of said property I have had nothing in any form or manner to do with the said suit or litigation, or paid any of the costs, expenses or attorney's fees for carrying on said suit on behalf of defendant."

Affiant further states that said statement above-mentioned was made by said Hopkins to him in the presence of Mrs. Heard, the sister of said Hopkins, and in the presence of Mr. Gustave Touchard, in said city and county of San Francisco.

Affiant further says that said Theron R. Hopkins made a similar statement to him on the 24th day of November, 1885, and that at said last-mentioned time, said statement was made to affiant by said Hopkins in the presence of Mrs. Heard, the sister of said Hopkins.

And further affiant sayeth not.

GEO. LEZINSKY.

Subscribed and sworn to before me this 4th day of December, A. D. 1885.

[SEAL.]

LEE D. CRAIG,
Notary Public.

Exhibit X 8 to Motion to Dismiss.

MOVING AFFIDAVIT.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.

M. Lewis, being first duly sworn, deposes and says that he is a resident of the city and county of San Francisco, State of California. That he is the agent and attorney-in-fact of Carl Liebmann, Solomon Herxheimer, and Jacob Triest, all of whom are residents and citizens of the Empire of Germany.

That on the 1st day of April, 1872, the Legislature of the State of California passed an act entitled "An act to open and establish a public street in the city and county of San Francisco, to be called Montgomery avenue, and to take private lands therefor," and which act was approved on said April 1st, 1872. That under and by virtue of said act certain bonds, called Montgomery avenue bonds, of the denomination of one thousand dollars each, were issued to the amount of fifteen hundred and seventy-five thousand ($1,575,000) dollars, which said bonds, together with the interest thereon from the 1st day of January, 1881, are now outstanding and unpaid. That said Carl Liebmann is the owner and holder of one hundred and sixteen of said bonds and the coupons of interest unpaid thereon. That said Solomon Herxheimer is the owner and holder of seventy-five of said bonds and the coupons of interest unpaid thereon. That said Joseph Triest is the owner and holder of one hundred and twenty-seven of said bonds and the coupons of interest unpaid thereon. That an action is now pending, on the said bonds owned by said Liebmann, in the Circuit Court of the United States, ninth circuit, district of California, and which action is numbered 3343. That an action is now pending, on said bonds owned by said Herxheimer, in the Circuit Court of the United States, ninth circuit, district of California, and which action is numbered 3347. That an action is now pending on the said bonds owned by said Triest, in the Circuit Court of the United States, ninth circuit, district of California, and which action is numbered 3340. Which actions are brought to

declare the validity of said bonds. That upon the trial of a similar action in the said Circuit Court, Philip G. Galpin, Esq., has appeared as an attorney in opposition to the said bonds, claiming to represent as his clients a number of the property owners of the district affected by the said act. That the said Galpin has filed briefs in said cause in opposition to the said bonds.

That affiant, to the best of his ability, has investigated the facts in the cause of Zeigler *v.* Hopkins, numbered 3259 in said Circuit Court, and has been informed and believes that the plaintiff in said cause, Henry Zeigler, is the father of Wilbur G. Zeigler, who is associated with and in the office of said Galpin. That said Galpin, acting through said Wilbur C. Zeigler, procured a deed to the property in controversy, to be made to said Henry Zeigler by Samuel F. Sinclair, who held a tax-deed to said property under a sale made for delinquent taxes, under the statute of the State, for the issuance of the said Montgomery avenue bonds, and which deed is the deed under which said Zeigler claimed title in said action. That the money paid to said Sinclair for said deed was furnished by the aforesaid clients of said Galpin. That after having procured said deed to be made in the name of said Henry Zeigler, as aforesaid, said Galpin procured Daniel Rogers to bring said action. That said Rogers was selected, designated, and employed by said Galpin, and the fees paid to said Rogers in said action have been paid by said Galpin and his aforesaid clients. That whatever expense has been incurred by the said plaintiff, Henry Zeigler, and his attorney, Daniel Rogers, have been borne and paid by said Galpin and his aforesaid clients. That after said action had been brought said Galpin procured said defendant Hopkins to convey said property to one J. J. Rey, who acted in the matter entirely under the direction and control of said Galpin, and the consideration of said conveyance, to wit, six hundred ($600) dollars, was paid by the said Galpin and his said clients. That the said Galpin has had the management of said action in the said Circuit Court, and has had said action conducted on both sides, that is, for both plaintiff and defendant, to suit his own purposes; and that the action of Daniel Rogers, as attorney of the plaintiff therein, has been merely nominal and perfunctory, and said Rogers has been entirely guided and controlled by said Galpin.

That from the said and all facts which affiant has learned, he is convinced beyond doubt that said action of Zeigler *v.* Hopkins was instituted and carried on and is now being prosecuted as a collusive suit, entirely under the control of parties who are interested in defeating a recovery upon the aforesaid Montgomery avenue bonds, and for the purpose of obtaining from this court, by collusion, a decision adverse to the holders of said bonds.

And further affiant sayeth not.

M. LEWIS.

Subscribed and sworn to before me this 4th day of December, 1885.

[SEAL.]

LEE D. CRAIG,
Notary Public.

Brief in Support of the Foregoing Motion.

This court has ever been careful to protect itself against suits involving no real controversy between the parties, or suits not involving amounts sufficient to give jurisdiction, regarding them, in legal contemplation, as frauds upon the court.

Dakota Co. v. *Glidden*, 113 *U. S.*, 222.
Webster v. *Buffalo*, 110 *U. S.*, 386.
Whiteside v. *Hazleton*, 110 *U. S.*, 296.
Gage v. *Pumpelly*, 108 *Ib.*, 164.
Wood Paper Co. v. *Heft*, 8 *Wall.*, 333.
Cleveland v. *Chamberlain*, 1 *Bl.*, 419.
Lord v. *Veasie*, 8 *How.*, 251.

It is asserted with much confidence, that a perusal of the papers accompanying this motion will convince the court, no stronger case was ever presented for the exercise of this power, to protect itself against merely colorable and collusive suits, than this.

D. M. DELMAS and
A. H. GARLAND,
Attorneys for Rosenbaum.